85-1356

No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1985

SILAS J. ALEXANDER, ET AL,

*Petitioners,*

*v.*

CHICAGO PARK DISTRICT, ET AL.

## CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. Section 144 requires disqualification of the trial judge on the ground of "a personal bias in favor of defendants" where the affidavits filed in support of plaintiffs' motion for disqualification establish that the trial judge participated pervasively and profoundly in the precise activities which, according to the affidavits, provide the basis for attacking defendants' credibility.

2. Whether a trial judge's "impartiality might reasonably be questioned" so as to require his recusal under 28 U.S.C. Section 455(a) where the affidavits filed in support of plaintiffs' motion for disqualification establish that the trial judge participated pervasively and profoundly in the precise activities which, according to the affidavits, provide the basis for attacking defendants' credibility.

## PARTIES TO PROCEEDING[1]

The named plaintiffs in this class action include:

Silas J. Alexander, Karen Turner, Renee Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillion, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fisher, Agnes Bernaugh, William Hall, Charles Adkins, Natalie Lyle.

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[1] "Plaintiffs" will be used throughout in lieu of "Petitioners"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

*No.*

SILAS J. ALEXANDER, ET AL,

*Petitioners,*

*v.*

CHICAGO PARK DISTRICT, ET AL.

**CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

A writ of certiorari is respectfully sought to review the Court of Appeals' order affirming the trial court's denial of plaintiffs' motions for disqualification of the trial judge under 28 U.S.C. Section 144 and 455(a).

## OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 773 F.2d 850 (7th Cir. 1985). The order of the court of appeals denying defendants' petition for rehearing appears at App. 2. The opinion of the district court denying the motions for disqualification (App. 4) is not reported.

## JURISDICTION

The judgment of the court of appeals (App. 1) was entered on September 19, 1985. A petition for rehearing was denied on November 13, 1985. This cross-petition for certiorari is filed in response to Case No. 85-1342.

## STATUTES AND CIRCUIT RULE INVOLVED IN THE CASE

Two statutory provisions are involved in this case: 28 U.S.C. Sections 144 and 455(a).

28 U.S.C. Section 144 provides in pertinent part:

> Bias or prejudice of judge
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. Section 455(a) provides in pertinent part:

> Disqualification of Justice, Judge, or magistrate
>
> a. Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Circuit Rule 18, also at issue in the instant case, provides:

> CIRCUIT RULE 18. Reassignment of Remanded Cases
>
> Whenever a case tried in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case. In appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand.

## STATEMENT OF THE CASE

### 1. PLAINTIFFS' INITIAL COMPLAINTS

On June 27, 1979, SILAS J. ALEXANDER and thirty-seven other black, Hispanic, and poor residents of Chicago amended a previously filed action by filing a class action lawsuit charging the CHICAGO PARK DISTRICT (hereinafter DISTRICT) and its superintendent and commissioners with various acts of racial and ethnic discrimination in violation of the Equal Protection Clause and 42 U.S.C. Section 1983. Each commissioner was sued individually and in his or her official capacity. Damages were sought in addition to injunctive relief.

The DISTRICT, a unit of local government, was created by the Illinois Legislature in 1933. Comprised of five hundred seventy-four (574) parks, playgrounds, and playlots of various sizes, it is required to provide recreational services throughout the territorial limits of the City of Chicago. The DISTRICT employs approximately 3,400 persons, has jurisdiction over approximately 7,321 acres of land and operates some eighty (80) divi-

sions and departments. It is governed by a five-person Board of Commissioners, whose members are appointed by the Mayor of Chicago.

On July 30, 1979, the district court dismissed without prejudice Counts V and VI of the Amended Complaint (relating to certain disputed real estate), but denied defendants' motion to dismiss the remaining counts.

These counts charged the defendants, *inter-alia*:

(a) with discriminating against black, Hispanic, and poor residents of Chicago in the allocation of recreational resources, i.e., staff, programs, and capital improvements, (*the general park conditions count*);

(b) with administering a racially and ethnically discriminatory civil service exam for the position of "physical instructor" and discriminating on the basis of race and ethnicity in the terms and conditions of employment (*the employment discrimination counts*); and

(c) with purposefully failing to correct known hazardous conditions existing within parks located in predominantly minority and poor neighborhoods, with the end result that plaintiffs, and the class which they sought to represent, experienced substantially disproportionate numbers of personal injuries (*the mass tort count*).

## 2. CERTIFICATION OF CLASS

On April 7, 1980, a class certification order was entered. The class, as defined, consisted of all black and Hispanic residents of the City of Chicago as to the general park conditions count, and designated subclasses appropriate to the employment discrimination and mass tort counts.

### 3. THE MOTION FOR A PRELIMINARY INJUNCTION

On December 2, 1981, plaintiffs moved for a preliminary injunction to restrain defendants from committing further constitutional violations. The motion for preliminary injunction related to the *general park conditions* count only. On September 30, 1982, the court denied plaintiffs' motion for preliminary injunction.

### 4. MOTIONS FOR DISQUALIFICATION OF THE DISTRICT COURT JUDGE

On November 12, 1982, plaintiffs filed two separate motions seeking disqualification of the district court judge, pursuant to 28 U.S.C. Sections 144 and 455(a). (App. 3).

### 5. APPEAL FROM THE DENIAL OF THE MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR REVERSAL PREDICATED ON THE TRIAL JUDGE'S FAILURE TO RECUSE HIMSELF UNDER 28 U.S.C. 455(a).

On October 30, 1982, plaintiffs filed a notice of appeal from the denial of the motion for preliminary injunction. Plaintiffs were required to file their initial brief with the Seventh Circuit on December 22, 1982. Because the trial court had not ruled on the motions for disqualification during the five-week period from the date of filing until the due date of plaintiffs' brief, no appealable order existed with respect to the Section 144 motion. However, since the Seventh Circuit has held that a party may seek disqualification pursuant to Section 455(a) *at any time, SCA Services, Inc.* v. *Morgan,* 557 F.2d 110, 117 (7th Cir. 1977), plaintiffs argued as part of the interlocutory appeal that the trial judge had breached his affirmative

duty to recuse himself *sua sponte* under Section 455(a), and that the appellate court should so rule.

**6. TRIAL COURT'S DENIAL OF MOTIONS FOR DISQUALIFICATIONS.**

On January 7, 1983, the trial court denied both motions for disqualification, and supported its order with a memorandum opinion (App. 4).

**7. PETITION FOR WRIT OF MANDAMUS TO DISQUALIFY TRIAL JUDGE.**

On January 27, 1983, plaintiffs filed a Petition for a Writ of Mandamus with the Seventh Circuit seeking disqualification of the trial judge pursuant to 28 U.S.C. Section 144, and 455(a), *Alexander* v. *Honorable George N. Leighton*, No. 83-1161. On February 8, 1983, a three-judge panel of the Seventh Circuit denied the Petition for a Writ of Mandamus in an order unsupported by opinion. On February 23, 1983, plaintiffs filed a petition for an en banc rehearing of the denial of the mandamus writ, which was denied April 4, 1983, also by order unsupported by opinion.

**8. TRIAL ON THE MERITS.**

Shortly before the start of the trial the district judge consolidated the *Alexander* action with that of *Midwest Community Council* v. *Chicago Park District*, 98 F.R.D. 491 (N.D.Ill. 1983), a class action lawsuit filed two months after *Alexander*, which charged the DISTRICT with racial discrimination in the allocation of recreational resources in certain predominantly black wards in Chicago.[2]

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[2] The Justice Department filed still a third lawsuit charging the DISTRICT with racial discrimination in the allocation of recreational resources, *United States* v. *Chicago Park District*, 82 C 7308 (N.D.Ill.). A consent decree was entered in that case in the fall of 1983.

(*Alexander* had charged racial *and* ethnic discrimination *throughout* the City of Chicago, and had also alleged employment discrimination, and acts supporting a mass tort count.) The trial on the merits began May 23, 1983. Plaintiffs elected to try their case to a jury instead of having a bench trial.[3]

## 9. AFFIRMANCE OF DENIAL OF MOTION FOR PRELIMINARY INJUNCTION.

On June 3, 1983, the Seventh Circuit affirmed the trial court's denial of the motion for preliminary injunction, *Alexander, et al.* v. *Chicago Park District, et al.*, 709 F.2d 463 (7th Cir. 1983). The Seventh Circuit declined, however, to reach the issue of disqualification under Section 455(a) stating that an order rendered under 28 U.S.C. Section 455(a) is not an interlocutory order appealable as of right under 28 U.S.C. Section 1292(a), and noting that plaintiffs had already obtained review through the mandamus proceeding.

## 10. SEVERANCE OF THE ALEXANDER EMPLOYMENT DISCRIMINATION AND MASS TORT COUNTS DURING TRIAL.

On June 13, 1983, during the trial, the *Midwest* plaintiffs moved for reconsideration of the consolidation order, and requested that the trial of the *Alexander* employment and mass tort counts be severed from the trial of the *Alexander* general conditions count and the *Midwest* case. On June 14, 1983, the trial court granted Midwest's motion and directed that the employment and mass tort counts be tried at a later time.

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[3] Due both to the racial composition of the venire, and defendants' exercise of their peremptory challenges, no blacks were represented in the jury.

**11. JURY VERDICT IN FAVOR OF DEFENDANTS.**

On August 17, 1983, the jury returned its general verdict in favor of all defendants and against all plaintiffs. The court immediately entered judgment on the verdict.

**12. DEFENDANTS' POST-TRIAL MOTION FOR SUMMARY JUDGMENT.**

On September 13, 1983, defendants filed a "Motion for Summary Judgment" respecting the employment discrimination and mass tort counts. Defendants contended that, under the doctrine of *res judicata,* the adverse judgment on Count I required dismissal of the employment discrimination and mass tort counts. On September 23, 1983, the trial court denied defendants' motion as to the employment discrimination counts, but granted it as to the mass tort count.

**13. PLAINTIFFS' FOURTH AMENDED COMPLAINT, MOTION TO DISMISS ORDER DISMISSING FOURTH AMENDED COMPLAINT.**

On October 24, 1983, plaintiffs filed their Fourth Amended Complaint. Defendants subsequently moved to dismiss the complaint in its entirety. Ten months later on October 18, 1984, the trial court dismissed certain counts on the basis of *res judicata.* The court dismissed the remaining employment discrimination counts, which were predicated on violation of the Equal Protection Clause and 42 U.S.C. Section 1983, on the ground that Title VII of Civil Rights Act, as amended, 42 U.S.C. Section 2000(e), preempts plaintiffs' right to sue the DISTRICT for violation of their constitutional right to be free of race discrimination in employment.

**14. PLAINTIFFS' APPEAL TO THE SEVENTH CIRCUIT, APPELLATE COURT'S RULING, DENIAL OF DEFENDANTS' MOTION FOR REHEARING.**

On November 20, 1984, plaintiffs appealed the dismissal of the Fourth Amended Complaint to the Seventh Circuit. Plaintiffs cited numerous grounds for reversal, including the trial court's denial of their Section 144 and 455(a) disqualification motions.

On September 19, 1985, the Seventh Circuit affirmed that portion of the trial court's order which dismissed certain of the counts on the basis of *res judicata,* and the district court's denial of the disqualification motions. The Seventh Circuit reversed the district court's dismissal of the employment discrimination counts, holding that they were not preempted by Title VII and remanded them for trial. (App. 1).

On October 3, 1985, defendants filed a Petition for Rehearing respecting the employment discrimination counts. On November 13, 1985, the Seventh Circuit modified certain language in its earlier order but denied defendants' Petition for Rehearing.

This Petition for Certiorari is delimited to a review of the Seventh Circuit's affirmance of the trial court's denial of the motions for disqualification.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF THE SIXTH CIRCUIT, AND SO FAR SANCTIONS THE TRIAL COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION.

**A. The trial judge's denial of plaintiffs' motions for disqualification pursuant to 28 U.S.C. Section 144 was improper.**

**1. The impetus for the motions.**

After plaintiffs and defendants had rested in the trial of the preliminary injunction, the trial judge called as a court witness Defendant-DISTRICT Commissioner THEODORE JONES, stating:

> "Mr. Theodore Jones was President of the Chicago Branch of the N.A.A.C.P. . . . for many years, a business man in this community. He is a defendant in this case. The plaintiffs have alleged that he and the other defendants have acted together to deprive them of their civil rights. I want to hear from Mr. Jones, what he knows about this."

The court then went on to question JONES preliminarily as follows:

> Q. Mr. Jones, would you state for the record how long you and I have known each other.
> A. Oh, gosh, I would say, your Honor, that it is approximately 40 years.
> Q. How many?
> A. Forty.

Q. 40, that's right. Would you describe the nature of our acquaintanceship?
A. Well, it has been both professional and civic and social, all three, I would say.
Q. Now you were, were you not, President of the Chicago Branch of N.A.A.C.P. in the City of Chicago?
A. Yes, I was.
Q. And what years were those, do you remember?
A. I was President in 1957, '58 and '59.
Q. Am I not correct, Mr. Jones, that in addition to that presidency you have been active in the Chicago Branch, N.A.A.C.P. for many years?
A. I have served on its board of directors since 1957 and until now.

The court then proceeded to matters having to do with the substance of the litigation.

Thus, for the first time on September 3, 1982, plaintiffs were made aware that defendant JONES' credibility was, in the judge's view, substantially enhanced by his association with the Chicago Branch N.A.A.C.P. Since Mr. Jones' presidency of the Chicago Branch had occurred more than 23 years before the hearing, there had been no reason to assume that association would have any effect on the court regarding the credibility of the defendants. However, when plaintiffs received the court's October 1, 1982 opinion denying their motion for preliminary injunction, it was abundantly clear that the court found defendant JONES' credibility virtually unimpeachable as a result of his N.A.A.C.P. - related past.[4] Paragraph 7 of the court's conclusions of law state:

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[4] In his opinion denying the motions for disqualification, the trial judge waxes just short of rhapsodic in characterizing his own and defendant JONES' civil rights "contributions". "This judge, when he was a practicing attorney, and also active in the civic affairs of Chicago, became acquainted with Mr. Jones. In a general way, they

7. This court found it necessary to call as its witness, Mr. Theodore Jones, a member of the Negro race, a civic leader in the Negro community of Chicago, a former president of the Chicago Branch, National Association for the Advancement of Colored People. Mr. Jones was neither deposed nor interviewed by the plaintiffs prior to the hearing of the motion for preliminary injunction. *This court concludes in evaluating Mr. Jones' testimony that he would have disclosed as candidly as he testified, any basis that would support the plaintiffs in this case. He did not.* (Emphasis supplied).

After receipt of the court's opinion on October 1, 1982, plaintiffs' counsel immediately undertook to determine whether JONES' activities in the N.A.A.C.P. warranted the high level of credibility ascribed to him by Judge Leighton. That inquiry revealed the facts related in the four affidavits of FAITH RICH and three prominent black citizens, EARL B. DICKERSON, LAWRENCE KENNON and TIMUEL BLACK, which were submitted in support of the motions for disqualification. (App. 3). These affidavits clearly allege facts which seriously impugn the character and effect of defendant Jones' N.A.A.C.P.-related activities. But they do far more than that. They also allege that, during defendant JONES' presidency, he and his administration were represented legally by Judge Leighton, who participated pervasively and profoundly in the activities which, according to affiants, clearly establish the basis for attacking defendant JONES' credibility.

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[4] (Continued)

were co-workers in many civil rights activities, *all having as their purpose the eradication of racism in the life of the American Negro in the City of Chicago*". (Emphasis Supplied) (App. 4, at pp. 35a-58a).

For example, affiant KENNON testified that during the summer of 1958, the west side unit of the N.A.A.C.P. was involved with protests against the DISTRICT triggered by the beatings by whites of blacks who had sought to use Rainbow Beach, then a segregated beach under the DISTRICT'S jurisdiction. The DISTRICT was charged with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use these facilities. According to affiant KENNON, during the two years of JONES' presidency, when Judge Leighton represented the N.A.A.C.P. and JONES, the organization abandoned support for the efforts being made to fight the discriminatory practices of the DISTRICT, and in addition, those of the City of Chicago and the Chicago School Board. Thus the affiants seriously impugn defendant JONES' and his administration's fidelity to the cause of the N.A.A.C.P., as well as the character and results of their activities in that regard. The affidavits further show that the trial judge shared with defendant JONES ties to the Democratic Organization which, according to the affidavits, JONES in fact served to the detriment of Chicago blacks.

It was because plaintiffs recognized that upon the trial on the merits, there would clearly be a substantial dispute over the matter of defendant JONES' credibility, with plaintiffs maintaining that, on the DISTRICT Board, as with the N.A.A.C.P. more than twenty years before, JONES' conduct egregiously disserved blacks because his ultimate loyalties were in both instances owed to a political organization which had as a guiding tenet the continued subjugation, and disenfranchisement of blacks. Accordingly, plaintiffs sought to disqualify the judge from rehearing the trial on the merits, which had yet to be scheduled.

**2. The bias standard as enunciated by this Court.**

In *Berger* v. *U.S.*, 255 U.S. 22 (1920), this Court held that the bias or prejudice against a judge must be based upon something other than a ruling in the case — that is, it must be "personal" or extra-judicial in nature. And the affidavits must set forth "the identifying facts of times, places, persons, occasions and circumstances with the particularity that would reasonably be expected in a bill of particulars". *United States* v. *Zagari*, 419 F. Supp. 494, 501 (N.D.Calif. 1976). However, in deciding whether the affidavits state facts and reasons for the belief that bias or prejudice exists, the judge is required to accept as true all of the allegations contained in the affidavits. *Berger*, 255 U.S. 36.

The degree of bias which will be held sufficient to disqualify a judge was addressed in *In Re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requisite of due process. Fairness requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man is permitted to try cases where he has an interest in the outcome. *That interest can not be defined with precision. Circumstances and relationships must be considered. This court has said, however, that every procedure which would offer a possible temptation to the average man as judge not to hold the balance, nice, clear and true between state and accused, denies the latter due process of law.* (cite). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform this high function in the best way, "justice must satisfy the appearance of justice" (cite). (Emphasis supplied).

Even the most cursory review of plaintiffs' affidavits establishes the painstaking particularity with which the facts establishing extra-judicial bias are attested.

**3. The extra-judicial nature of the trial judge's attitudes and conceptions.**

The bias alleged in the instant case is indisputably extra-judicial in nature. Although plaintiffs *discovered* Judge Leighton's bias through his remarks in court regarding the weight which he attached to defendant JONES' credibility, the affidavits show that the bias in favor of the defendants was "an attitude of extra-judicial origin", *Zagari*, 419 F.Supp. at 501. The trial judge stated that in his opinion Jones "would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case". His faith in the credibility of defendant JONES' testimony and in the non self-serving nature of that testimony *must* stem from extra-judicial sources, as reasonable persons automatically assume that *during his testimony a party-defendant* will be an advocate for his own self-interest. Yet the trial judge, even before he heard defendant JONES' testimony, assumed the opposite. A reasonable person would wonder why the court had such unswerving faith in defendant JONES' testimony. Plaintiff Bradford's affidavits supply the answer. They chonicle the past extra-judicial association of the party-defendant and the trial judge, and establish that rather than being a "freedom fighter" in the cause of black rights, defendant JONES had cooperated with the trial judge, then his attorney, to subjugate those rights in the name of party politics.

The court in *U.S.* v. *Conforte*, 457 F.Supp. 641, 658 (D.C. Nev. 1978) aff. 624 F.2d 869 cert. den. 449 U.S. 1012 (1980) incisively explains the clear distinction between the "origin" of bias and its "place of expression".

> The purpose of the extra-judicial source requirement concerns the origin of the judge's bias rather than the place of its expression. Certainly, judicial rulings or comments on the evidence made during the course of a proceeding do not fall within the rule. However, if a judge's statements or conduct during a trial refer to or reflect a bias or prejudice which arose outside of his judicial duties, then the extra-judicial source rule is justified and reversal may be required.

As in *Conforte*, the origin of the trial judge's bias, although expressed in court, was extra-judicial.

**4. The trial judge's credibility enmeshed with that of defendant JONES.**

One key factor distinguishes this case from myriad others where disqualification has been sought but deemed inappropriate. Plaintiffs here *do not* seek to disqualify the trial judge because he was the friend of defendant JONES, nor because the trial judge was legal counsel to defendant JONES and the Chicago Branch N.A.A.C.P. during his presidency. Rather, plaintiffs contend that disqualification is mandatory because the trial judge *participated* pervasively in the activities which constitute the basis for attacking the credibility of defendant JONES. An attack on defendant JONES' credibility would necessarily and unavoidably require an attack on policies and actions which not only defendant JONES, but the trial judge himself personally participated in formulating and executing. An attack in these circumstances on defendant JONES' credibility would be an attack on the court's credibility. To expect impartiality in such circumstances would be sheer folly.

**5. Other Section 144 requirements: Affidavits of party, Certificate of Counsel, timeliness.**

As required by Section 144, RENEE' BRADFORD, a named plaintiff, filed her motion in support of the affidavit to disqualify the trial judge.[5] As required, her affidavit was the *first* and *only* affidavit submitted on behalf of plaintiffs, and it was based on information and belief. *Berger* v. *United States*, 255 U.S. at 35.[6] The requisite Certificate of Counsel accompanied the motions.

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[5]. In his opinion denying the motions, the trial judge attempts to impart significance to the fact that plaintiff Bradford's "affidavits do not contain any argument which would show that she personally knows this judge, or that he knows her." That such is the case is irrelevant, however, since plaintiff Bradford alleges "a personal bias or prejudice in favor of the defendants." Moreover, no direct relationship between the judge and a party or case is required in order to establish bias on the part of the judge. *Bell* v. *Chandler*, 569 F.2d 556 (10th Cir. 1978).

[6]. The trial judge, citing *Hall* v. *Burkett*, 391 F.Supp. 237, 242 (W.D. Okla. 1975) also states that plaintiff Bradford's incorporation by reference of the KENNON etc. affidavits into her own is improper. The trial court's use of that authority is inapposite. After the court there ruled that the motion was untimely *and* defective because not predicated on an extra-judicial source, it then noted, without citation to any authority, that "the doctrine of incorporation by reference has no application in a Section 144 affidavit". The court was prompted to make this statement because the moving party, the United States Attorney for Kansas, had attempted to establish bias by relying on the ". . . . actions, rulings, and orders . . . in the named proceeding . . . . as more fully appears from the files and transcripts . . . which are by this reference made a part of this affidavit." By contrast plaintiffs' affidavits plead extra-judicial facts with great specificity, not generalized references to "the court files and records." That *Hall* is a less than illustrious authority on which to rely is further evidenced by the fact that after denying the motion to

The first paragraph of Section 144 requires that a party file a "timely" affidavit. The second paragraph thereof provides that the affidavit "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time". However, terms of the district courts were abolished in 1963, 28 U.S.C. Section 138, and pursuant to local court rule, the United States District Court for the Northern District of Illinois meets in continuous session (Rule 1.10 of the United States District Court - Northern District.) Accordingly, there is no specific "timely" period which the court can refer to under the terms of the statute.

Although for the reasons outlined above the statute gives no guidance on what will be a "timely" filing, the case law is well settled that one must raise the issue of disqualification of a judge at the earliest possible moment after knowledge of the facts demonstrating the basis for disqualification become known. *United States* v. *Patrick,* 542 F.2d 381, 390 (7th Cir. 1976) cert. den. 430 U.S. 931 (1977). Plaintiffs have fully complied with this requirement. In the instant case, defendant JONES first testified as the court's witness on September 3, 1982. The court's order and Memorandum Opinion were filed on September 30, 1982. The instant motion for disqualification was filed

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[6] (Continued)

disqualify, the trial court then entered an order disbarring the United States Attorney and six of his assistants. Not surprisingly, this order was reversed on appeal. *Burkett* v. *Chandler,* 505 F.2d 217 (10th Cir. 1974), cert den. 423 U.S. 876 (1975). Too, no other court has ever followed the unsupported reference in *Hall* relied on by the trial court.

immediately after the court called JONES as a witness, after plaintiffs learned the significance and the high degree of credibility which the court ascribed to his testimony, after investigation revealed to plaintiffs the facts attested to by affiants, and after the transcript of the relevant court proceedings became available.

It is important to note, too, that plaintiffs sought the court's disqualification from hearing the *prospective trial on the merits,* which had yet to be set for trial and was to be held at some unknown future date. Since there could be no reasonable suggestion that the motion was made for purposes of delay, and since plaintiff BRADFORD had filed her motion at "the earliest possible moment after knowledge of the facts demonstrating grounds for disqualification became known", plaintiffs' motion was clearly timely.

**B. Plaintiffs' Section 455(a) motion is legally sufficient.**

**1. Time requirements under Section 455(a).**

Even if the Section 144 motion was considered untimely, the Section 455(a) motion for disqualification was not time-barred. In his memorandum opinion, the trial Judge stated that "[i]t is now settled that [the Section 144] time requirement applies with equal force to a motion under 28 U.S.C. Section 455(a)." However, the authority cited for that proposition, *In Re: International Business Machines Corp.,* 618 F.2d 923, 932 (2nd Cir. 1980), not only is in derogation of Seventh Circuit precedent, but also is based upon dictum. By contrast, in holding that there is no Section 455 timeliness requirement, the Seventh Circuit cited the legislative history of the statute to support its ruling:

> . . . . . Congress did not incorporate (a time limitation) in the statute. *SCA Services, Inc.* v. *Morgan,* 557 F.2d 110, 117 (7th Cir. 1977) (citations omitted).

**2. The appearance of partiality.**

The standard for asserting disqualification based on Section 455(a) is not whether a judge feels he is able fairly to hear a case, but whether a reasonable person who knows all the relevant facts would think the judge impartial. And in close cases, the judge must recuse himself. *Roberts* v. *Bailar*, 625 F.2d 125, 129 (6th Cir. 1980). The facts in *Bailar* closely parallel those of the instant case. There the district judge expressed his opinion that defendant, who was at least partly responsible for the challenged employment decisions, was an honorable man who "would never intentionally discriminate against anybody." *Id.* at 127. The district judge's pre-trial statement in *Bailar* echoes the trial judge's statements about JONES before and after his testimony at the preliminary injunction hearing. The trial judge attempts to distinguish his conduct from that of the judge in *Bailar*, stating that he did not prejudge the testimony of defendant Jones since "it was only in the course of these judicial proceedings that this judge had the opportunity to learn what Mr. Jones knew about the principal defendant in this case, the DISTRICT." (Ap. 4, p. 39a) The affidavits of course dispute this contention. Moreover, although the judge did note when questioning JONES that he and JONES had a friendship of forty years' duration, *he failed to note that he had represented Jones and the N.A.A.C.P. during Jones' presidency, when his clients were charged with complicity in the perpetuation of the DISTRICT'S alleged racial discrimination.* (See KENNON and BLACK affidavits). Under even the most conservative application of the standards of Section

455(a), the judge should have granted plaintiffs' motion for disqualification.

**C. The Seventh Circuit's affirmance of the trial court's denial of the disqualification motions was improper.**

The Seventh Circuit ruled (1) that the Section 144 motion was not predicated on an extra-judicial source; (2) that unlike the judge in *Roberts* v. *Bailar,* "the judge specified in denying the recusal motions that he had not prejudged Jones' testimony"; and (3) that the Section 455(a) motion required denial since the judge's impartiality might not be reasonably questioned since the association between the judge and defendant was "ancient history".

As noted in the preceding section, the mere fact that a bias is expressed in court does not preclude the bias from having an extra judicial origin. Moreover, the court's assertion that the trial judge had not prejudged the defendant completely ignores the basis of the disqualification motions: that in order to attack the credibility of defendants, the credibility of the trial judge would also have to be attacked. Ruling against disqualification because *"the judge said he was not biased"* eviscerates the guarantee of a tribunal of the type prescribed by *In Re Murchison.* The court's "ancient history" assessment requires rejection both because it is frighteningly facile, and as noted in *Berger*: *"to commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed."* 255 U.S. 36. The instant case is clearly one which would (and did) offer a possible temptation to the average man as judge ". . . not to hold the balance, nice, clear and true." In summary, the Seventh Circuit's ruling requires reversal because it repudiates the rulings of this Court, and the measured holding of *Bailar,* and in so doing makes a mockery of plaintiffs' right to a fair tribunal.

**D. Having reversed in part the trial court's order, Circuit Rule 18 requires remand to a different judge.**

Under Circuit Rule 18, on remand a different judge should have been assigned to the *Alexander* case. This result is required both because of the Rule and because neither a district judge nor the parties should have a vested interest in having a particular judge hear a particular action. *See Berger*, 255 U.S. at 35.

## II.

## CONCLUSION

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari be granted.

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Dated: February, 1986

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## APPENDIX 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 84-2995

SILAS J. ALEXANDER, et al.,

*Plaintiffs-Appellants,*

*v.*

CHICAGO PARK DISTRICT, et al.,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 2242—GEORGE N. LEIGHTON, *Judge*

ARGUED JUNE 4, 1985—DECIDED SEPTEMBER 19, 1985

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Before CUMMINGS, *Chief Judge*, ESCHBACH, *Circuit Judge*, and WRIGHT, *Senior Circuit Judge.**

WRIGHT, *Senior Circuit Judge*. This lengthy litigation alleging discrimination in resources allocation and employment by the Chicago Park District during the years 1970 through 1980 raises these issues:

1) Did the court err in dismissing three counts of the amended complaint under res judicata and collateral estoppel?

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* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

2) Did it err in dismissing the remaining three counts of the amended complaint for failure to state a cause of action under 42 U.S.C. § 1983?

3) Did it err in denying plaintiffs' recusal motions?

## FACTS

The procedural sequence in this case is convoluted and will be simplified here to include only pertinent facts.

In 1979, Alexander filed a class action on behalf of all Black, Hispanic and poor Chicago residents alleging racial discrimination by the Chicago Park District and its attorneys, superintendent and past and present commissioners (collectively District). Personal liability is sought against the individual defendants.

In 1982, we affirmed the court's denial of plaintiffs' motion for a preliminary injunction to restrain the budgetary and fund allocation actions of the District. *Alexander* v. *Chicago Park District*, 709 F.2d 463 (7th Cir. 1983). Plaintiffs then filed two unsuccessful motions to disqualify Judge Leighton and followed these with a mandamus petition which we denied on February 8, 1983. Alexander's petition for an en banc rehearing on this mandamus petition was denied on April 4, 1983.

In 1983, the district court denied plaintiffs' motion for class notification under FED. R. CIV. P. 23(c)(2). It determined that class members would not be prejudiced because if the defendants prevailed, the class members without notice would not be bound.

Later in 1983, the district court consolidated this case with another class action, *Midwest Community Council, Inc.* v. *Chicago Park District* (*Midwest*), No. 79 C 3187 (N.D. Ill. Sept. 16, 1983) (unpublished), which raised similar discriminatory recreational resources allocation claims against the District. The *Midwest* action sought only equitable relief.

In count I of the second amended complaint, plaintiffs alleged that defendants administered the Chicago Park District in a racially discriminatory manner, so that parks located in predominantly Black communities were allocated less park resources, including state and federal funds, resulting in injuries and disparities in equipment and services. This count was brought under 42 U.S.C. § 1983.

Relying on the Due Process and Equal Protection clauses of the United States and Illinois Constitutions and on § 1983, plaintiffs brought employment discrimination claims in counts II and III. Count II charged that a civil service examination administered by the Park Service was not (1) job-related, (2) culturally, racially and sexually unbiased, and (3) objectively administered.

Count III dealt with hiring, assigning and promoting employees based on race and ethnicity. This count also alleged a variance in numbers of administrative, recreational, support and maintenance staff between parks in white and non-white communities. This in turn was alleged to have forced certain plaintiffs to resign from park employ because of limited job opportunities.

Count IV, brought under § 1983, alleges personal injuries to several plaintiffs resulting from these racially discriminatory practices. A fifth count was subsequently deleted.

The consolidated cases were tried in 1983. The court severed Alexander's employment discrimination and tort claims. During trial, Alexander filed a third amended complaint, similar to the second in the relevant allegations.

After a three-month trial, the jury returned a verdict for the defendants on the resources allocation claims and judgment was entered against plaintiffs on count I in the *Alexander* suit. Because the jury heard the *Midwest* claims in an advisory capacity only, the court subsequently en-

tered judgment for the District, incorporating its own findings of fact and conclusions of law. No appeal was taken from the *Midwest* judgment.

Defendants moved for summary judgment contending that the jury verdict on count I was res judicata on all claims in counts II, III and IV. In an order dated September 23, 1983, the court granted summary judgment on count IV, reasoning that the underlying basis of the tort claim was discriminatory resources allocation causing dangerous conditions in black neighborhood parks. The court granted a partial summary judgment on counts II and III to the extent that discrimination in resource allocation or administration would not be relitigated. It then dismissed counts II and III under FED. R. CIV. P. 54(b) to allow the parties to appeal.

Alexander did not appeal but filed an amended complaint as authorized in the September 23 order. Count I alleged that the District expended federal funds in a racially and ethnically discriminatory manner in violation of regulations of the Department of Housing and Urban Development and Department of Interior under 42 U.S.C. § 1983.

Count II sought an injunction, reinstatement, back pay and damages under Due Process and Equal Protection Clauses of the United States and Illinois Constitutions and under 42 U.S.C. § 1983. It challenged the civil service examination given by the District on November 1, 1977 for a physical instructor position.

Count III incorporated the allegations of count I that defendants allocated resources to the parks in a discriminatory manner and the allegations of count II concerning the civil service examination. It also was brought under 42 U.S.C.§ 1983.

Count IV alleged that the District had a policy of allocating resources and employees on a discriminatory basis in violation of the Due Process and Equal Protection

Clauses of the United States and Illinois Constitutions and 42 U.S.C. § 1983. It sought monetary relief for hiring, assignment and payment of personnel on a racially discriminatory basis.

Count V alleged that the District expended federal funds in a discriminatory manner and contrary to federal regulations, resulting in class members being forced to resign from the District's employ. Count VI alleged that the policy of expending federal funds in a discriminatory manner resulted in reduced maintenance, aid and inspections at minority parks, resulting in physical injuries to minority members.

The District moved to dismiss on the grounds of res judicata and that the complaint failed to state a claim under 42 U.S.C. § 1983. The court granted the motion on October 18, 1984, dismissing counts I, V and VI on res judicata grounds and counts II, III and IV for failure to state a claim.

ANALYSIS

**Res Judicata**

Res judicata is a doctrine of repose. "Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals." *Nevada* v. *United States*, 463 U.S. 110, 129 (1983), quoting *Southern Pacific Railroad* v. *United States*, 168 U.S. 1, 49 (1897). *See also Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 469 (7th Cir. 1982) (purpose is to reduce costs of litigation).

Under res judicata, or claim preclusion,[1] a prior judgment on the merits bars the same parties or their privies

[1] Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or

from relitigating all issues which were raised and decided or could have been raised in the prior action. *Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *Lee* v. *City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). The doctrine applies in civil rights suits as well. *Lee*, 685 F.2d at 198-99; *Local 1006, A.F.S.C.M.E., AFL-CIO* v. *Wurf*, 558 F. Supp. 230, 233 (N.D. Ill. 1982). *See also Migra* v. *Warren City School Dist. Bd. of Education*, 465 U.S. 75, ....., 104 S. Ct. 892, 899 (1984) (state preclusion law applies in federal § 1983 suit brought subsequent to state suit).

In determining the preclusive effect on the six counts in the fourth amended complaint of the jury's verdict on count I and the summary judgment on count IV of the third amended complaint, the court analyzed the three threshold requirements of res judicata: (1) identity of parties; (2) identity of causes of action; and (3) a final judgment on the merits. *Lee*, 685 F.2d at 199. *See Nevada* v. *United States*, 463 U.S. 110, 129-30 (1983); *Local 1006*, 558 F. Supp. at 234.

**1. Identity of Parties**

The court found that named plaintiffs in the fourth amended complaint were named also in the third amended

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[1] **(Continued)**

their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendant acts to bar any further claims by plaintiff against that defendant. It is usually referred to as res judicata, and that is how we use it. *See Migra* v. *Warren City School Dist. Bd. of Education*, 465 U.S. 75,—— 104 S. Ct. 892, 894 n.1 (1984).

Issue preclusion prevents relitigation of a matter of fact or law that was previously litigated and decided. *See Jones* v. *City of Alton*, 757 F.2d 878, 879 n.1 (7th Cir. 1985). It is usually referred to as collateral estoppel.

The trial court dealt with both issue and claim preclusion. Because of our decision on claim preclusion, we need not reach the collateral estoppel issue.

complaint and so concerned itself only with the last two requirements. Twenty-seven plaintiffs were named in the third amended complaint. They were named in the fourth amended complaint, with the addition of the Commite Latino. No allegations were made as to the membership of the Commite and no motion for intervention was made. *See* 3B J. Moore, J. Kennedy, *Moore's Federal Practice* ¶ 23.90[2] (2d ed. 1985). The court ignored it as not properly a party to this class action and we agree.

On appeal the plaintiffs argue that res judicata was inappropriate because the court refused to require notice to the class. This does not affect application of res judicata against the named plaintiffs. Any preclusive effect against potential class members not notified of the suit is not an issue before us. *See Teamster Local 282 Pension Trust Fund* v. *Angelos*, No. 84-2141, slip op. at 4 (7th Cir. May 13, 1985) (second court decides for itself preclusive effect of first litigation).

**2. Identity of Causes of Action**

The trial court held that counts I of the third and fourth amended complaints were identical. It found that counts V and VI were premised on the same facts, which is sufficient identity for res judicata purposes.

A cause of action consists of "a single core of operative facts" which give rise to a remedy. *Mandarino* v. *Pollard*, 718 F.2d 845, 849 (7th Cir. 1983) (operative facts were employment termination and surrounding circumstances), *cert. denied*, ..... U.S. ....., 105 S. Ct. 116 (1984); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230, 1234-35 (7th Cir. 1982) (essential fact underlying first and second suit was seniority), *cert. denied*, 460 U.S. 1070 (1983); *Lee*, 685 F.2d at 200 (cause of action consists of single core of operative facts).

Plaintiffs assert that they complain of violations of federal regulations in counts V and VI, charges not made in previous complaints. This argument is to no avail. The

essential fact in count I of the third amended complaint was discriminatory fund disbursement. It is the essential fact underlying counts V and VI of the fourth amended complaint.

A mere change in the legal theory does not create a new cause of action. *Shadid* v. *Oklahoma City*, 494 F.2d 1267, 1268 (10th Cir. 1974). *See also Harper Plastics*, 657 F.2d at 945 ("An unsuccessful party may not . . . frustrate . . . res judicata by cloaking the same cause of action in the language of a theory untried in the previous litigation."). Extensixe evidence regarding compliance with the regulations was presented at trial.

Plaintiffs argue also that the general jury verdict is insufficient to determine precisely what was found on each issue. This confuses res judicata and collateral estoppel.

They assert that they were precluded from presenting evidence on injuries and deaths at the parks. The injury evidence went only to the issue of damages, not liability.

Both of the preceding arguments can be characterized as a challenge to the opportunity to fully and fairly litigate these claims. *See Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982); *Lee*, 685 F.2d at 201. This argument cannot be sustained in view of the three-month jury trial. Plaintiffs had a full and fair opportunity to litigate the issue of fund allocations. *See Jones*, 757 F.2d at 884; *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 745 F.2d 441, 451-52 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985).

**3. Finality**

The plaintiffs challenged finality on the grounds that the September 23 order was insufficient for rule 54(b) purposes. The district judge did not agree but found that, even if the order was not appealable, it had the requisite finality for res judicata purposes.

Rule 54(b) requires that if a court enters final judgment on fewer than all the claims it must make a deter-

mination that there is no just reason for delay and expressly order the entry of judgment. FED. R. CIV. P. 54(b). The September 23 order did not technically comply with Rule 54(b), but it was clear:

> In order to enable the parties to this cause to appeal or cross-appeal, and in conformance with Rule 54(b), Fed. R. Civ. P., counts II and III of the Third Amended Complaint are dismissed, subject to the right of plaintiffs to file a Fourth Amended Complaint . . . .

The plaintiffs argue that remarks made by the court at a post-judgment conference indicate that the judgment was not to be considered final. The remarks came upon entry of the order. Because it is clear, and because the parties were explicitly told that the court wanted guidance from an appellate decision, we are convinced that the parties knew of their right to appeal.

The court did say it would certify under 28 U.S.C. § 1292(b) the res judicata effect of the count I verdict on counts II, III and IV. Even though no 28 U.S.C. § 1292(b) certification was entered, this did not make less clear the September 23 order.

Finally, while not expressly determining there was no just reason for delay in the order itself, the judge did determine that an appeal would be in the interest of the public, the court and the plaintiffs. This litigation had been before Judge Leighton for four and one-half years.

Although reluctant to deviate from the strict Rule 54(b) requirements, we have held that less than technical compliance will suffice when neither party is prejudiced by the lack of formality. *Local P-171, Amalgamated Meat Cutters & Butchers* v. *Thompson Farms Co.*, 642 F.2d 1065, 1072-73 (7th Cir. 1981); *accord Equal Employment Opportunity Comm'n* v. *Delta Air Lines, Inc.*, 578 F.2d 115, 116 (5th Cir. 1978). Plaintiffs' prejudice, if any, stems

from their choice not to appeal the September 23 order and not from lack of sufficient notice that the order was appealable.

Plaintiffs also challenge the dismissal of count IV of their third amended complaint on res judicata grounds. This issue was appealable as of September 23, 1983. We note that the district court correctly determined this issue.

The district court was also correct that the September 23 order was sufficiently final for res judicata purposes even if not appealable. *Lummas Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962), held that judgments not final for § 1291 can be " 'final' in the sense of precluding further litigation [depending on] such factors as the nature of the decision, . . . the adequacy of the hearing and the opportunity for review." *Accord O'Reilly* v. *Malon*, 747 F.2d 820, 822-23 (1st Cir. 1984); *Commodity Futures Trading Comm'n* v. *Board of Trade of City of Chicago*, 701 F.2d 653, 657 (7th Cir. 1983); *Chemetron Corp.* v. *Business Funds, Inc.*, 682 F.2d 1149, 1191 (5th Cir. 1982), *rev'd on other grounds*, 460U.S. 1007 (1983).

There is no doubt that two of the three *Lummas Co.* factors have been met here. The jury rendered a verdict only after a protracted trial. *See also Aiello* v. *City of Wilmington*, 470 F. Supp. 414, 419 (D.Del. 1979), *aff'd*, 623 F.2d 845 (3d Cir. 1980) (jury verdict final "in the sense of inalterable" from the date entered).

**Title VII and § 1983**

The district court dismissed the remaining counts of the Alexander plaintiffs' complaint on the grounds that Title VII is the exclusive remedy for employment discrimination charges. Under the principle established in *Trigg* v. *Fort Wayne Community Schools*, No. 84-1942 (7th Cir. June 25, 1985), we reverse.

Title VII is not the sole remedy for employment discrimination claims of state employees. *Id.*, slip op. at 5-6.

Congress intended to retain preexisting remedies. Only if the right asserted was created by Title VII must it be vindicated through the procedural system set up in that Act. *Accord Day* v. *Wayne County Bd. of Auditors,* 749 F.2d 1199, 1204 (6th Cir. 1984). *See also Carpenter* v. *Stephen F. Austin State University,* 706 F.2d 608, 612 n.1 (5th Cir. 1983) (Title VII is remedy unless specific allegations of constitutional violations); *Rivera* v. *City of Wichita Falls,* 665 F.2d 531, n.4 (5th Cir. 1982) (when § 1983 used as alternate remedy to Title VII, elements of cause of action are the same); *Whiting* v. *Jackson State University,* 616 F.2d 116, 121 (5th Cir. 1980) (same).

We sympathize with defendants' position and note that our holding and that of the Sixth Circuit create the anomolous situation that a federal employee is limited by the administrative procedures of Title VII while state employees are not. Because we interpret what remedies Congress has provided, we rule as we do. Congress may amend Title VII if it so chooses.

Counts II and IV are based on the Fourteenth Amendment's protection against intentional discrimination based on class membership. *Trigg,* slip op. at 2; *Huebschen* v. *Department of Health and Social Services,* 716 F.2d 1167, 1171 (7th Cir. 1983). They survive at this stage of the proceedings.

Count III is more problematic. Plaintiffs concede it is based on statutory violations. *See Maine* v. *Thiboutot,* 448 U.S. 1, 4 (1980). To the extent that it also alleges discriminatory fund disbursement, the district court has correctly ruled that the issue is already decided and may not be relitigated. That court will carefully limit the evidence to assure that defendant will not again be subjected to defending those allegations.

**Recusal**

On November 12, 1982, plaintiffs filed disqualification motions against Judge Leighton under 28 U.S.C. §§ 144 and 455(a). The motions were based on statements by the

court during the hearing on plaintiffs' motion for a preliminary injunction and findings and conclusions entered in ruling on that motion.

Again we rule against plaintiffs on this issue. Under section 144, bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); *United States* v. *English*, 501 F.2d 1254, 1263 (7th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). The plaintiffs' affidavits set forth only rumor concerning the administration of the Chicago NAACP 25 years ago.

Plaintiffs' insinuations that the trial judge did not vigorously pursue alleged discrimination when he represented the NAACP are not an extrajudicial source of bias. What must stem from an extrajudicial source are facts and information.

Judge Leighton called as a witness Mr. Jones, a former President of the Chicago NAACP whom he had represented 25 years earlier. He indicated surprise that the plaintiffs had not called Jones or deposed him.

Contrary to plaintiffs' assertions, Jones' credibility was not automatically enhanced. The judge specified in denying the recusal motion that he had not prejudged Jones' testimony. *Cf. Roberts* v. *Bailar*, 625 F.2d 125, 127-29 (6th Cir. 1980).

Section 455(a) requires recusal if the judge's impartiality might reasonably be questioned. 28 U.S.C § 455(a); *Pepsico, Inc.* v. *McMillen*, No. 85-1932, slip op. at 3-4 (7th Cir. June 6, 1985). The association between Judge Leighton and Mr. Jones in 1958 was ancient history and insufficient to support a recusal motion.

**CONCLUSION**

We affirm the dismissal of counts I, V, and VI on res judicata grounds. We remand counts II, III and IV to the district court to rule first on the several other grounds raised in the District's summary judgment motion.

Judge Leighton has dealt with this complicated case in an admirable fashion. We affirm his dismissal of plaintiffs' recusal motions.

This case has been in the court system since June 27, 1979. In the interests of bringing it to an end and decreasing the costs to the parties and the courts, we retain jurisdiction during this remand. After final orders are entered below, this case will be resubmitted to this court and panel without oral argument. Leave will be granted to file briefs within three weeks after the record is certified to us. *See Grano* v. *Department of Development of City of Columbus*, 637 F.2d 1073, 1082 (6th Cir. 1980).

AFFIRMED IN PART AND REVERSED IN PART.

A true Copy:
Teste:

.....
*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. EUGENE A. WRIGHT, *Senior Circuit Judge**

No. 84-2995

SILAS J. ALEXANDER, et al.,

Plaintiffs-Appellants,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 2242
GEORGE N. LEIGHTON, *Judge*.

ORDER

On consideration of the petition for rehearing of defendants-appellees and the response thereto of plaintiffs-appellants, our slip opinion of September 19, 1985, is hereby corrected in the following two respects:

On page 11 of the slip opinion, the paragraph beginning "Count III is more problematic * * *" is replaced with the following four paragraphs:

> "Count III is more problematic. Plaintiffs concede that it is based on statutory violations. Generally,

* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

where a statute provides its own comprehensive enforcement scheme, that scheme may not be bypassed by pleading an underlying violation of the statute and bringing suit directly under § 1983. *Middlesex County Sewerage Authority* v. *National* Sea Clammers Association, 453 U.S. 1, 20 (1981) (Federal Water Pollution Control Act, Marine Protection, Research and Sanctuaries Act); *Smith* v. *Robinson*, 104 S.Ct. 3457, 3468 (1984) (Education of the Handicapped Act); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973) (habeas corpus).

"Title VII is one of the statutes that may not be by-passed. *Grand American Federal Savings* v. *Novotny*, 442 U.S. 366, 375-378 (1979) (Title VII may not be bypassed via § 1985(3)). Is Title VI like Title VII in this respect?

"We think it is. Title VI provides its own administrative enforcement procedure which would be bypassed by pleading Title VI violations under § 1983. Moreover, the remedies available under Title VI should in some cases be limited to declaratory and injunctive relief. *Guardians Association* v. Civil Service Commission, 463 U.S. 582, 597-598 (1983). This limitation would be lost in the broad grant of a remedy at law or equity available under § 1983.

"Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983. See *Guardians Association*, 463 U.S. at 610 n.3 (Powell, J., concurring)."

On page 12 of the slip opinion, the paragraph beginning "We affirm the dismissal * * *" is replaced with the following paragraph:

"We affirm the dismissal of counts I, V and VI on res judicata grounds. We affirm the dismissal of count III for failure to state a claim. We remand counts II and IV to the district court to rule first on the several other grounds raised in the District's summary judgment motion."

The petition for rehearing is hereby denied.

## APPENDIX 3A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

MOTION FOR DISQUALIFICATION OF JUDGE DUE TO BIAS OR PREJUDICE PURSUANT TO 28 U.S.C. SECTION 144

Plaintiff, RENEE' BRADFORD, files herewith her affidavit as required by Title 28, United States Code, Section 144, to show that the HONORABLE JUDGE GEORGE N. LEIGHTON has a personal bias or prejudice against her, or a bias in favor of the defendants herein.

Based thereon, plaintiff RENEE' BRADFORD respectfully moves that the HONORABLE JUDGE GEORGE N. LEIGHTON proceed no further herein and that another judge be assigned to both hear this motion and the subsequent proceedings herein.

BY: /s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

STATE OF ILLINOIS )
)
COUNTY OF COOK )

AFFIDAVIT OF RENEE' BRADFORD,
PLAINTIFF, IN SUPPORT OF MOTION
TO DISQUALIFY JUDGE
FOR BIAS OR PREJUDICE PURSUANT TO
28 U.S.C. SECTION 144

I, RENEE' BRADFORD, being duly sworn, say:

1. I am one of the plaintiffs in the lawsuit, *SILAS J. ALEXANDER, ET AL., VS. CHICAGO PARK DISTRICT, ET AL.*

2. I am informed and believe, and based on such information and belief, allege that the HONORABLE JUDGE GEORGE N. LEIGHTON, the judge before whom this cause is pending, has a personal bias or prejudice against me, or a bias in favor of the defendants herein.

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the Affidavits of EARL B. DICKERSON, LAWRENCE KENNON, FAITH RICH, and TIMUEL BLACK which are attached hereto and made a part hereof.

BY: /s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

## CERTIFICATE OF COUNSEL

I, RUFUS COOK, lead counsel herein, in accordance with the provisions of Title 28, U.S.C. Section 144 hereby state that this Motion and the Affidavits in support thereof, and this Certificate of Counsel are all made in good faith.

BY: /s/ Rufus Cook
Rufus Cook

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

AFFIDAVIT

I, EARL B. DICKERSON, being first duly sworn, do hereby depose and say:

1. I am a black lawyer licensed to practice in Illinois, residing at 4800 South Lake Shore Drive. I graduated with the A. B. Degree from the University of Illinois in 1914, and enrolled in the University of Chicago Law School. After service in the American Expeditionary Force in Europe during the First World War, I returned to the University of Chicago Law School, where I graduated in 1920, and was admitted in the same year to the Illinois Bar. I began the practice of law in Chicago in 1920, and in that year also became General Counsel of the Supreme Life Insurance Company. In October, 1955 I was elected President and Chief Executive Officer of Supreme Life, which positions I held until 1971, when I became Chairman of the Board of Directors, in which position I served until January, 1973 when, upon retirement, I became Honorary Chairman of the Board.

In the years from 1920 down to the present day, I have been active in matters having to do with civil rights. I served as a member and acting chairman of President Roosevelt's first Fair Employment Practices Commission in 1940. I have served as President of the National Lawyers' Guild, and as Chairman of the Board of Directors of the Chicago Urban League. I was for more than 25 years, beginning about 1937, a member of the National

Board of Directors of the National Association for the Advancement of Colored People. I was Chairman of and worked with the Legal Redress Committee of the Chicago Branch, N.A.A.C.P. during the decades of the 1930's, 1940's, and into the 1950's. I was counsel in the case of *Hansberry* v. *Lee,* in which the United States Supreme Court struck down restrictive racial covenants in housing. I served as counsel in numerous other cases brought by or on behalf of the N.A.A.C.P. in Chicago and elsewhere.

2. During 1957, Mr. Theodore Jones served under me as Vice-President and Comptroller of the Supreme Life Insurance Company and occupied an office next to mine at the Company Headquarters. As a national board member of the N.A.A.C.P. residing in Chicago, I was requested, in the fall of 1957, to recommend a person to serve as the next president of the Chicago Branch. I called Mr. Jones into my office and inquired, in the presence of the National Branch Co-ordinator, who was visiting Chicago at the time, as to whether he would be willing to serve. Mr. Jones asked to be excused for a moment, and left the room. Since he appeared to be gone for a long time, I stepped next door to his office to determine what the trouble was. I found Mr. Jones engaged in a telephone conversation with Mr. William Dawson, then Democratic Ward Committeeman of the Second Ward in Chicago. Mr. Jones, as he confirmed when the conversation was concluded, had sought and obtained the approval and support of Mr. Dawson in Mr Jones' effort to become president of the Chicago Branch of the N.A.A.C.P.

I subsequently attended the Chicago Branch N.A.A.C.P. election held in the late fall of 1957. I observed present, there and voting a large number of members of Mr. Dawson's Second Ward Organization, who had not theretofore been known to me to be members of the N.A.A.C.P.

Mr. Jones was elected that evening as President of the Chicago Branch of the N A.A.C.P.

FURTHER AFFIANT SAYETH NOT.

/s/ Earl B. Dickerson
Earl B. Dickerson

SUBSCRIBED AND SWORN TO
before me this 28th day
of October, 1982

/s/ Agnes F. Hales
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

AFFIDAVIT

I, FAITH RICH, being first duly sworn, do hereby depose and say:

1. I have been a member of the National Association for the Advancement of Colored People continuously since 1945. I received the B. A. Degree from the University of Vermont in 1928, and the Ph.D. Degree from Bryn Mawr College in 1934. I am presently retired from employment with the Chicago Board of Education.

2. For several years prior to 1957 I worked with the west side and north side units of the N.A.A.C.P., and with the Chicago Branch, concerning myself in particular with matters related to education. From 1945 through 1957 I worked with the city-wide education committee of the Chicago Branch and, during 1955 to 1957, the north side unit to produce a study entitled *De Facto Segregation in Chicago Public Schools*, which was issued by the Chicago Branch of the N.A.A.C.P. in 1957, prior to the election of Theodore Jones to the presidency of the Chicago Branch in late fall, 1957. Two pertinent pages of that study are attached to this Affidavit. The study, together with data obtained by the north side unit, supplied the basis for the Chicago Branch N.A.A.C.P. and its north side unit to confront the Chicago Board of Education and the City of Chicago, and to challenge their published plans for construction and pupil assignment activities which would increase, rather than decrease,

segregation in the school system, and particularly on the north side of Chicago. I was personally involved in communications conducted with the Board of Education and the City in 1956 and 1957 based on the matters substantiated in the study. Those communications were, through 1957, conducted by the north side unit with the active support of the Chicago Branch of the N.A.A.C.P., and had, by December, 1957, progressed to the point where the N.A.A.C.P.'s representatives, including myself, and the representatives of the City and the Board of Education, were tentatively prepared to agree on alternative plans to those which the N.A.A.C.P. opposed.

After Mr. Jones was elected president of the Chicago Branch and took office in January, 1958, the support of the Chicago Branch for continued activity in this area was withdrawn. When the north side unit sought to continue the effort, Mr. Jones moved to abolish the unit. The Chicago Board of Education then proceeded to abandon the negotiations and to implement its original plans.

In or about 1967, several years after Mr. Jones' term had ended, the National Office of the N.A.A.C.P. authorized the establishment of three coequal Chicago Branches — the south side, the west side and the north side.

FURTHER AFFIANT SAYETH NOT.

/s/ Faith Rich
Faith Rich (Dr.)

SUBSCRIBED AND SWORN TO
before me this 29th day
of October, 1982
/s/ Lillian Schean

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

AFFIDAVIT

I, LAWRENCE KENNON, being first duly sworn, do hereby depose and say:

1. I am a lawyer licensed to practice in the state of Illinois, having been admitted to the bar in 1956 after having received the B.S. and J.D. Degrees from De Paul University. I am presently a partner in the law firm of WASHINGTON, KENNON, HUNTER and SAMUELS, located at 2600 South Michigan, Chicago, Illinois.

In the years from 1946 to the present day I have been involved and active in the civil rights movement. I have been a member since 1946 of the Chicago Branch of the National Association for the Advancement of Colored People. I was an Assistant State's Attorney of Cook County from 1957 to 1961, at the end of which time I participated in forming the law firm of which I am presently a partner. During the years since 1957, I have represented individuals and organizations involved in the civil rights struggle, including the N.A.A.C.P., the Co-Ordinating Council of Community Organizations, the Mississippi Freedom Democratic Party, the Afro-American Patrolman's League, the American Civil Liberties Union, and others.

2. I attended the meeting held in the fall of 1957, when Theodore Jones was elected President of the

Chicago Branch, N.A.A.C.P. Prior to Mr. Jones' election, the Chicago Branch and northside, westside and Hyde Park units were actively involved in pursuing civil rights matters in their respective spheres, of which several entailed challenges of various types to actions taken by the Democratic Party and/or the City of Chicago. Prior to 1958 the units were the action arms of the Chicago Branch of the N.A.A.C.P., and were for several years the sources through which the Chicago Branch gathered data from which to identify areas for action and, once such areas were identified, the units were the primary source of local manpower and talent for addressing whatever problem was to be addressed. The Chicago Branch itself served as the headquarters, the central governing body and, through its Legal Redress Committee, as the mechanism through which legal initiatives were taken on behalf of blacks in Chicago. When the Legal Redress Committee was chaired by Earl B. Dickerson and his successors, the administration of the Chicago Branch was not directly connected to the Chicago Democratic Party. The principal thrust of the Chicago Branch at that time, prior to 1957, was in the area of utilizing the units or their equivalents, on the one hand, for data-gathering, issue identification, and direct action, utilizing the Branch and its Legal Redress Committee, on the other hand, for co-ordination and vindication of the rights of black people in the courts.

I was Adult Advisor to the westside youth council of the N.A.A.C.P. in 1957, 1958 and 1959. Immediately prior to the election of Theodore Jones, prominent among the matters with which the westside unit and its youth council were concerned were:

(a) Protest and planned legal action against racial discrimination fostered by the Chicago Board of Education and then Superintendent Benjamin Willis, and the City of Chicago.

(b) Charges of discrimination and planned legal action against the City of Chicago and Chicago Board of Education for fostering and

failing to combat discrimination in the labor unions supplying tradesmen to city agencies and to the Chicago Board of Education.

(c) Demonstrations and protests against the racially discriminatory policies of the Chicago Park District.

With respect to the Chicago Park District in particular, one of the defendants in the litigation in which this Affidavit is submitted, the westside unit and its youth council were involved during the summer of 1958 with demonstrations and protests against the District triggered by the beatings by whites of several blacks who had sought to use the facilities at Rainbow Beach, then a segregated beach located at and south of 75th Street. We charged the Park District, among other things, with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities traditionally used by whites.

During 1957 the N.A.A.C.P. westside unit, its westside youth council and other N.A.A.C.P. units were supported by the Chicago Branch in the principal activities outlined above, having to do with the City of Chicago and the Chicago Board of Education and schools discrimination, and the City of Chicago, the Board of Education, and labor union discrimination. In the year 1957 the administration of the Chicago Branch N.A.A.C.P. was headed principally by persons having no apparent ties to the Chicago Democratic Party.

After the election of Theodore Jones in late fall of 1957, support of the Chicago Branch for the activities of the westside unit was withdrawn. Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch N.A.A.C.P. were to be discontinued by Jones and his administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic Organization. Mr. Dawson was at

that time Ward Committeeman of the 2nd Ward Regular Democratic Organization, and the publicly acknowledged leader of the 3rd, 4th, and 20th Wards. Mr. Jones named as his administration's Chairman of the Legal Redress Committee of the Chicago Branch, and legal adviser to the president, George Leighton, who, on information and belief, was also connected to the Democratic Organization in that he had been President of the Third Ward Regular Democratic Organization, and continued to be active in the Chicago Democratic Organization.

During 1958, after Mr. Jones' election, the activities of the westside unit detailed above received virtually no support from the Chicago Branch. The process of withdrawal of support by the Jones administration, which included George Leighton as legal counsel, resulted in a number of challenges being made from time to time in N.A.A.C.P. meetings to the legality and propriety of actions taken by the Jones administration. These challenges were often referred to and decided in those meetings by George Leighton, whose opinions consistently favored whatever position had been taken by Mr. Jones.

In August, 1958, Theodore Jones moved to abolish the units of the Chicago Branch. Almost simultaneously, and contrary to the by-laws and rules of the organization, he (1) illegally increased the 35-member Executive Committee by 5 persons, (2) illegally "authorized" those 5 newly-appointed persons to vote on the issue of abolition of the units; (3) illegally failed to provide notice to the units or their chairmen of the action to be taken, thus refusing to afford them an opportunity to be heard. Challenges made to the legality of these actions were rebuffed, based in part on legal opinions supplied by George Leighton.

Before the illegal and improper actions to be taken by the Jones administration were made known to the membership, Mr. Jones caused to be published in Chicago and national publications statements to the effect that

the units were to be abolished to rid the N.A.A.C.P. of "communist influences." No evidence was ever produced to support that allegation regarding a single person and, to the best of my knowledge, not one of the persons active in the units was then or has since been in any way shown to have been subject to any such influence. By making that completely unfounded public accusation, however, for which he had no authority from the Board of Directors, Mr. Jones and his administration dealt a grievous blow to the Chicago N.A.A.C.P., and cast aspersions on the character and reputation of persons who were never afforded the opportunity to defend themselves, and who were ousted from the organization by means of procedures rife with irregularities.

During the two years of Mr. Jones' Presidency, the Chicago Branch N.A.A.C.P. effectively abandoned opposition to the discriminatory policies of the City of Chicago and the Chicago Board of Education, and the president abandoned support for the efforts then being made to fight the discriminatory practices of the Chicago Park District. Leadership in these areas was largely assumed by an organization called the Co-Ordinating Council of Community Organizations, formed in part to fill the void left by the inaction of the Chicago Branch N.A.A.C.P. during Mr. Jones' administration. During this period, I am aware of no initiatives taken by the organization or its Legal Redress Committee, chaired by George Leighton, to challenge the discriminatory policies of the City of Chicago or the Chicago Board of Education.

Far from supporting and furthering the interests of black people, the two-year administration of Theodore Jones resulted in acts consistently inimical to the interests of black people, including abandonment of the initiatives theretofore begun against agencies of local government, violation of the by-laws and rules of the organization, abolition of the units, and a cessation of the traditional role of the Legal Redress Committee—vindication of the legal rights of blacks. I, and many others who were active in the Chicago Branch N.A.A.C.P. and its

units during 1957-1959, seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people.

FURTHER AFFIANT SAYETH NOT.

/s/ Lawrence Kennon
Lawrence Kennon

SUBSCRIBED AND SWORN TO
before me this 3 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, ET. AL.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, ET AL.,

Defendants.

NO. 79 C 2242

AFFIDAVIT

I, TIMUEL D. BLACK, being first duly sworn, hereby depose and say:

1. I am a resident of Chicago, Illinois. I received the B.A. Degree from Roosevelt University in 1952, and the M.A. Degree from the University of Chicago in 1954, after which time I completed all classwork requirements for the PH.D Degree in Educational Administration at the University of Chicago. I have taught in the public schools of Gary, Indiana and Chicago, Illinois. I served as Assistant Director of the National Teacher Corps, and have served as a Dean with the City Colleges of Chicago, as Vice-President of Academic Affairs at Olive-Harvey College, and as Director of Community Affairs for the City Colleges of Chicago. I am currently serving as full Professor of Social Sciences at Loop College.

I have served and presently serve as a member of the Board of Directors and the Executive Committee of the Chicago Branch of the American Civil Liberties Union; as a member of the National Board of Directors of Americans for Democratic Action; as Board Member of the Independent Voters of Illinois; as Vice-President of the Chicago-Area Alliance of Black School Educators, and as a member of the Board of Directors of Friends of The Parks.

I have read the Affidavit signed by Lawrence Kennon relative to this litigation. I have personal knowledge of the events described on pages 2 through 7 thereof, and would testify to substantially the same effect if I were called as a witness in the case.

I also attended the fall, 1957 meeting of the Chicago Branch N.A.A.C.P. at which Theodore Jones was elected president. Aside from precinct workers and captains from the Second Ward Organization of which William Dawson was committeeman, I saw precinct captains and workers from the 3rd, 4th and 20th Wards, all at that time publicly acknowledged to be under the leadership of William Dawson.

In addition to the matters related in the Kennon Affidavit, I was one of several persons who sought, while Theodore Jones was President and George Leighton was Legal Redress Committee Chairman of the Chicago Branch N.A.A.C.P. to have the organization fulfill one of its traditional roles by moving legally against the City of Chicago and the Chicago Board of Education to remedy discrimination against blacks. In particular, in 1957 and 1958 we sought, in the wake of the decision of the United States Supreme Court in Brown v. Board of Education, to have the N.A.A.C.P. Legal Redress Committee seek the cessation of segregation in the Chicago Public Schools. We were rebuffed by Mr. Leighton and Mr. Jones.

I and others also sought in 1957 and 1958 to have the N.A.A.C.P. and the Legal Redress Committee press the City of Chicago legally on the issue of housing segregation. Again, we were refused by Mr. Leighton and Mr. Jones.

The events surrounding the election of Mr. Jones in 1957 and, with respect to matters involving any challenge to City Government and/or the Democratic Party, the subsequent inaction of the N.A.A.C.P. and its Legal Redress Committee, were the result of a deal whereby the Chicago Branch N.A.A.C.P. became a captive of the

Democratic Party. The actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the Organization against its members, and were opposed to the interests of black people and the Organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the Board of Commissioners of the Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the N.A.A.C.P., where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party.

FURTHER AFFIANT SAYETH NOT.

/s/ Timuel D. Black
Timuel D. Black

SUBSCRIBED AND SWORN TO
before me this 3rd day
of November, 1982

/s/ Lillian Schean
Notary Public

[Memorandum Of Law Was Not Included]

## APPENDIX 3B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, ET AL.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, ET AL.,

Defendants.

NO: 79 C 2242

MOTION FOR DISQUALIFICATION OF JUDGE
PURSUANT TO 28 U.S.C. SECTION 455 (a)

Plaintiff, RENEE' BRADFORD, shows that the HONORABLE JUDGE GEORGE N. LEIGHTON, is disqualified from presiding as judge at the trial of the above-numbered and entitled cause under the provisions of 28 U.S.C., Section 455(a) because his impartiality might reasonably be questioned, as more fully set forth in the affidavit attached hereto and made a part hereof.

Wherefore, plaintiff, RENEE' BRADFORD, moves that the HONORABLE JUDGE GEORGE N. LEIGHTON declare himself disqualified to sit on the hearing of this cause and that another judge be assigned to hear motion and action.

/s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

AFFIDAVIT IN SUPPORT OF MOTION
FOR DISQUALIFICATION OF JUDGE
PURSUANT TO TITLE 28 U.S.C. SECTION 455(a)

I, RENEE' BRADFORD, being duly sworn say:

1. I am one of the plaintiffs in the lawsuit, *SILAS J. ALEXANDER, ET AL.*, v. *CHICAGO PARK DISTRICT, ET AL.*

2. I am informed and believe, and based on such information and belief, allege that JUDGE GEORGE N. LEIGHTON'S "impartiality might reasonably be questioned", and he is therefore disqualified to act in this cause under the provisions of Title 28, U.S.C. Section 455(a).

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the Affidavits of EARL B. DICKERSON, FAITH RICH, LAWRENCE KENNON and TIMUEL BLACK which are attached hereto, incorporated by reference herein and made a part hereof.

/s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

[REFER TO AFFIDAVITS SUPPORTING § 144
MOTION SET FORTH AS EXHIBIT 3A]

[MEMORANDUM OF LAW NOT INCLUDED]

## APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

Before the Honorable GEORGE N. LEIGHTON
United States District Judge

Memorandum

Relying on 28 U.S.C. §§144 and 455(a), Renee Bradford, one of 35 Negro and Hispanic plaintiffs in this class suit, has filed two motions seeking to disqualify the court from further participation in this case. Briefs and memoranda have been filed; and from the contentions of the parties, two issues are presented. First, whether under the circumstances of this case, the disqualification motions should be transferred for hearing to another judge of this court. Second, if there is no transfer, whether the affidavits in support of the motions are legally sufficient and timely.

After considering the question of transfer, the motions, the affidavits supporting them, the record of these proceedings, and applying the controlling principles of law, this court concludes that transfer of the disqualification motions to another judge of this court is not warranted; and that the affidavits are neither timely nor sufficient. Therefore, for the following reasons, the motions to transfer and to disqualify the court are denied.

I.

This suit was filed on June 1, 1979 by Dorothy Ware, as the sole plaintiff. Suing under 42 U.S.C.§§1983 and 1988, she alleged in a three-count complaint that the defendants Chicago Park District, its Attorney and Agent, its Commissioners from 1976 to 1979, and its General Superintendent, were liable for the deceit and fraud that deprived her of property interests in a certificate of sale assigned to her by the purchaser at a foreclosure of delinquent real estate taxes. Ms. Ware alleged that the real estate in question was a walled vacant lot at 5017 South Ellis Avenue in the city of Chicago that had a value of $350,000. She did not purport to represent a class; nor did she allege any of racial other invidious discrimination by defendants. She prayed for injunctive relief, damages actual and punitive, and attorney's fees. The lawyer who filed her suit was Mr. Rufus Cook, who had also represented her in the state court proceedings which she described as a bitter and acrimonious dispute. Summons issued, defendants were personally served, they appeared, moved for and obtained an extension until July 5, 1979 to answer or otherwise plead to the complaint.

Before any defendant had answered, the amended complaint which is now the pleading in this case was filed. Silas J. Alexander was the lead plaintiff; Dorothy Ware and Renee Bradford were among the other 34 Negroes and Hispanics who alleged they were suing on behalf of themselves and others similarly situated, "all individual black, Latino or poor residents of the City of Chicago." In Counts I through IV and VII, plaintiffs alleged race discrimination in the allocation of Chicago Park District resources by defendants, race discrimination in employment practices in park district facilities, and race discrimination in the availability to Negroes and Hispanics of adequate protection in parks administered by defendants. They said that their claims arose under the Fourteenth Amendment to the Constitution of the United States, Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000(a), *et. seq.*, and

42 U.S.C. §1983. In Counts V and VI, Ms. Ware restated the claims she had made in her earlier complaint; the defendants were the same ones she had originally named with the addition of two Commissioners who had taken office early in 1979.

Thereafter, the parties proceeded with pretrial motions. Plaintiffs moved for class certification, with defined subclasses. Defendants moved to dismiss the amended complaint. The motions were set on briefing schedules, with an order that stayed discovery to await the court's rulings. Ultimately, defendants' motion was granted only as to the counts in which Dorothy Ware reasserted the claims she had made in her original complaint; thus, Counts I through IV and VII of the amended complaint remained for defendants to answer. Over defendants' strenuous and persistent objections, plaintiffs' motion to certify the class, and define subclasses, was granted. The case then entered the stage of discovery proceedings.

The discovery demands of the parties on one another began on July 30, 1979. Interrogatories were filed under the rules; motions for production of documents were made. Motions to compel production and answers were cross-filed. The intensity of the discovery disagreements required the court to refer these pretrial matters to a magistrate. This was done; and later, status reports were made to the court. An appeal from a ruling of the magistrate was taken to this court by defendants; and after hearing the parties, the magistrate's ruling which awarded plaintiffs attorney's fees in one of the discovery disputes was affirmed.

On December 2, 1981, plaintiffs filed a verified motion for a preliminary injunction in which they asked this court to immediately restrain and enjoin defendants from adopting or seeking to adopt any budget, plan or scheme for the expenditure of public funds used for park purposes which fails to provide for substantially equal allocation of funds "to park facilities without regard to race, color

or ethnic derivation of the users of the park facilities, or of the persons resident in the neighborhoods wherein the said facilities are located." They prayed for an injunction restraining defendants from adopting any plan or scheme for the expenditure of public funds which "fails to show on a per park basis the sums to be expended, in such fashion as to omit determination of whether and to what extent black and Latino parks are discriminated against in terms of allocation of funds, in violation of the fourteenth amendment to the Constitution of the United States and the Illinois Constitution [sic]."

Defendants objected to the motion. They argued that plaintiffs had filed their amended complaint in July 1979; that defendants, without any action by plaintiffs, had adopted budgets for the years 1980 and 1981; that the park district's 1982 budget was scheduled for public hearing on December 10, 1981, and was scheduled for consideration by its Commissioners on or before December 22. Therefore, defendants insisted that plaintiffs' motion for a preliminary injunction was not timely and did not deserve a hearing.

This court overruled defendant's objections and set the motion for a day certain. The hearing began on December 29, 1981. Three days were devoted to the taking of evidence; and at the end of that period, counsel for the plaintiffs requested that the matter be continued to allow presentation of other evidence, including a witness who had to travel a great distance in order to appear before this court. The request was granted, the matter was continued; and then, for various reasons, some a conflict in this court's trial schedule, others the inability of either plaintiffs' counsel or counsel for defendants to be in court, the hearing extended over seven additional court sessions. When plaintiffs rested their case in chief, defendants moved for a direct finding in their favor; this court denied the motion and required them to introduce evidence.

One of the defendants in this case is Mr. Theodore Jones who until early in 1979 was a Chicago Park District Com-

missioner. He is a Negro, well-known in Chicago as a businessman who for many years has been active in the civic affairs of the Negro community of the city. This judge, when he was a practicing lawyer and also active in the civic affairs of Chicago, became acquainted with Mr. Jones. In a general way, they were co-workers in many civic activities, all having as their purpose the eradication of racism in the life of the American Negro in the city of Chicago.

On perhaps two social occasions, this judge and his wife visited the home of Mr. and Mrs. Jones. In 1957 and 1958, Mr. Jones was elected president of the Chicago Branch, National Association for the Advancement of Colored People. It is well known that in both state and federal levels, Mr. Jones has worked in and with private organizations and public agencies whose aims are the prohibition and elimination of race discrimination against Negroes in work opportunities.

When the lawyers for the parties informed the court that they were about to conclude presentation of evidence in the preliminary injunction proceedings, it inquired if either of them was going to call Mr. Jones as a witness. Both parties disclosed that they did not intend to call him. The court, for the record, revealed its acquaintance with Mr. Jones and expressed the desire to hear from him. Because he was a Chicago park district Commissioner, a citizen who has been active in the Negro community of Chicago, this court believed that Mr. Jones' testimony would assist it in resolving the controversy presented by plaintiffs' motion for a preliminary injunction. As a consequence of the court's colloquy with counsel, Mr. Jones was informed about the court's request and he appeared. He was initially questioned by the court. His testimony covered his personal background and his knowledge of the policies of the Chicago Park District.

Then, after hearing all the evidence which the parties had to offer, and making scheduling accommodations for them, the court heard their counsel in oral argument. It

invited them to propose findings of fact, suggest conclusions of law, and support their respective positions with post-trial briefs. The matter was set for ruling; and on September 30, 1982 the court made its findings of fact, and reached its conclusions of law.

One of the findings was that:

> Theodore Jones was called as the court's witness. During his tenure as a [Park District] Commissioner, Mr. Jones attended most meetings of the Park District Board. He is personally familiar with several parks. With respect to personnel, he initiated and won approval of an affirmative action employment program. He testified concerning the responsiveness of the Park District Board to his suggestions which included capital improvements at the South Shore Country Club and Jackson Park, a golf driving range on the South Side, funding for the DeSable Museum of African American History, and work at the 31st Street Beach.

Concerning these facts, the court concluded, in part, that:

> [In his testimony Mr. Jones] would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case. He did not. Taking his testimony, together with all the other evidence this court has heard, the court is satisfied that there is very little likelihood of plaintiffs succeeding on the merits at trial in this case.

Accordingly, plaintiffs' motion for preliminary injunctive relief was denied.

Renee Bradford was not a witness during the preliminary injunction proceedings; nor did she appear in court either before or during the hearing of the motion. She has never been before this court; and her affidavits do not contain any averment which would show that she personally knows this judge, or that he knows her. She does

not claim any experience from which it could reasonably be inferred that this judge has ever had the occasion to manifest any feeling of prejudice toward her personally. It does not appear either from any affidavit, claim, or reference to any portion of the record, that this judge has ever said anything to or about Ms. Bradford.

However, on November 12, 1982, she filed a motion for disqualification of judge due to bias or prejudice pursuant to 28 U.S.C. §144, saying that the court "has a personal bias or prejudice against her, or bias in favor of the defendants herein." She moved that this court "proceed no further herein and that another judge be assigned to both hear this motion and the subsequent proceedings herein." On the same day, she filed a motion for disqualification of judge pursuant to 28 U.S.C. §455(a) saying that this judge is disqualified from presiding at the trial of the above-numbered and entitled cause "under the provisions of 28 U.S.C. §455(a) because his impartiality might reasonably be questioned, as more fully set forth in the affidavit attached hereto and made a part hereof." She moved that this judge "declare himself disqualified to sit on the hearing of this cause and that another judge be assigned to hear this motion and action." The affidavit supporting her Section 144 motion is as follows:

I, Renee Bradford, being duly sworn, say:

1. I am one of the plaintiffs in the lawsuit, *Silas J. Alexander, et al* v. *Chicago Park District, et al.*

2. I am informed and believe, and based on such information and belief, allege that the Honorable George N. Leighton, the judge before whom this cause is pending, has a personal bias or prejudice against me, or a bias in favor of the defendants herein.

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Lawrence Kennon, Faith Rich, and Timuel Black, which are attached hereto and made a part hereof.

The following is her affidavit in support of the motion under 28 U.S.C. §455(a):

> I, Renee Bradford, being duly sworn, say:
>
> 1. I am one of the plaintiffs in the lawsuit, *Silas J. Alexander, et al.* v. *Chicago Park District, et al.*
>
> 2. I am informed and believe, and based on such information and belief, allege that Judge George N. Leighton's 'impartiality might reasonably be questioned', and he is therefore disqualified to act in this cause under the provisions of Title 28, U.S.C. §455(a).
>
> 3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Faith Rich, Lawrence Kennon and Timuel Black, which are attached hereto, incorporated by reference herein and made a part hereof.

II.

A

We begin with the observation that the mere filing of an affidavit of prejudice does not require a judge to recuse himself. On the contrary, a judge has the affirmative duty to inquire into the legal sufficiency of such an affidavit and not disqualify himself unnecessarily, particularly, where the request for disqualification was not made at the threshhold of the litigation and the judge has acquired valuable background of experiences with the case. *National Auto Brokers* v. *General Motors Corporation,* 572 F.2d 953, 958 (2d Cir. 1978); *Raitfort* v. *Bradley,* 446 F.Supp. 129, 130 (E.D. Pa. 1978).

It has been said by an able and experienced district judge of this circuit that "[w]hen a party has filed an affidavit alleging personal bias or prejudice on the part of a judge before whom a matter is pending, that judge has the obligation to determine the legal sufficiency of the affidavit because only '[h]e knows fully his own thoughts and feelings in the complete context of facts al-

leged.'" *Matter of Searches Conducted on March 5, 1980,* 497 F.Supp. 1283, 1287 (E.D. Wis. 1980), quoting Sirica, J., in *United States* v. *Mitchell,* 377 F.Supp. 1312 at 1315 (D. D.C. 1974). Consistent with this statement, our court of appeals has held that when a district judge is presented with a motion asking for his recusal, he is "entitled to pass upon the sufficiency of the affidavit, but, of necessity, all factual allegations [have] to be taken as true." *Action Realty Co.* v. *Will,* 427 F.2d 843, 844 (7th Cir. 1970); see *Berger* v. *United States,* 255 U.S. 22, 32 (1921). And recently, Judge Aspen of this court had occasion to say that "[a]lthough judges have, on occasion, referred the question of their own disqualification to another judge for disposition, we think the better procedure in this case is for the judge presiding over the case to resolve the motion for disqualification since [he is] in the best position to appreciate the circumstances surrounding the allegations in the affidavits." *U. S.* v. *Professional Air Traffic Controllers Org.,* 527 F.Supp. 1344, 1352 (N.D. Ill. 1981).

In what is perhaps the latest word on this subject uttered by any federal court of appeals, the Fifth Circuit, in *Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co.,* 690 F.2d 1157, 1162 (5th Cir. 1982), pointed out that "[t]he challenged judge is most familiar with the alleged bias or conflict of interest. He is in the best position to protect the nonmoving parties from dilatory tactics." Then, calling attention to *United States* v. *Haldeman,* 559 F.2d 31, 131 (D.C. Cir. 1976) for the proposition that submitting recusal motions to fellow judges for decision is at most permissive, the court went on to say that "[r]eferring the motion to another judge raises problems of administrative inconvenience and delay."

This court agrees. Plaintiffs' case has been on this court's docket since June 1, 1979. In the period of about two and a half years, during which hundreds of orders have been entered, a preliminary injunction motion has been heard, the court has acquired a valuable background of experience concerning the case. It now understands

the plaintiffs' theories and the contentions made on their behalf by their lawyers. More importantly, the court knows and understands, at least so it believes, the lead lawyer for the plaintiffs, Mr. Rufus Cook. From his demeanor in court, his attitude, and what he has said orally and in writing, the court has gained the distinct feeling that he harbors an intense hatred for the defendants and the lawyers who represent them. Defendants' lawyers, on the other hand, never seem to miss an opportunity to respond to Mr. Cook, in kind, and displaying their own brand of his attitude. This court fully knows its thoughts and feelings about the plaintiffs, the defendants, and the context of the facts alleged in the affidavits filed in support of the recusal motions. It knows the duty owed to all the parties to see that dilatory tactics not be condoned, that problems of administrative inconvenience not be raised, and that the case proceed to trial so that justice will be done in accordance with the law and the evidence.

Under these circumstances, it would be judicial cowardice of the first order for this court, as moved by plaintiff Renee Bradford in her two motions, "to proceed no further herein and that another judge be assigned to hear these motions. . . ." Therefore, the disqualification motions will not be transferred to another judge; instead, this court will discharge its duty and proceed to determine the timeliness and legal sufficiency of the affidavits filed in support of the motions to recuse. *United States* v. *Azhocar,* 581 F.2d 735, 738 (9th Cir. 1978); *Action Realty Co.* v. *Will,* 427 F.2d 843, 844 (7th Cir. 1970); Wright, Miller & Cooper, Federal Practice and Procedure §3551.

B

As to the question of timeliness, it should be noticed that when Congress gave a party in a district court proceeding the right to move for the recusal of a judge, the first obligation it imposed on the movant was that he file "a timely . . . affidavit." See Act Mar. 3, 1911 c. 231, §31, 36 stat. 1090; 1949 U.S. Code Cong. Service p. 1248; 28

U.S.C. §1944. It is now settled that this time requirement applies with equal force to a motion under 28 U.S.C. §455(a). *In re: International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368, 379 (N.D. Ohio 1980). Its purpose is to prevent litigants from abusing motions to disqualify, using them as dilatory tactics, or as means to sample the temper of the court before deciding whether to raise an issue of disqualification. *Peckham* v. *Ronrico Corp.*, 288 F.2d 841, 843 (1st Cir. 1961); see 48A C.J.S. Judges §136.

Section 144 provides that the affidavit "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard. . . ." This provision, however, is no longer pertinent because terms in federal district courts have been abolished, although the procedure still requires that an affidavit be timely filed. *Smith* v. *Danyo*, 441 F.Supp. 171, 175 (N.D. Pa. 1977). And whenever the question is raised, the inquiry into timeliness, either under Section 144 or Section 455(a), is concerned with the movant's reasonable diligence in filing the affidavit. *Samuel* v. *University of Pittsburgh*, 395 F.Supp. 1275, 1279 (W.D. Pa. 1975), *vacated on other grounds*, 538 F.2d 991 (3d Cir. 1976). An affidavit is untimely under either statute if the affiant, after knowledge of facts showing supposed bias, has invoked or sought to invoke the court's affirmative action on his behalf before claiming prejudice on the part of the judge. "If the alleged information upon which the Motion for Disqualification is based was known or knowable to the movant a considerable period of time prior to the Motion, then such Motion is untimely." *Rademacher* v. *City of Phoenix*, 442 F.Supp. 27, 29 (D. Ariz. 1977). For, as our court of appeals has said, "one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification. *United States* v. *Patrick*, 542 F.2d 381, 390 (7th Cir. 1976).

The records of this case show that on September 3, 1982, the day Mr. Jones testified, Ms. Bradford's lead counsel, Mr. Rufus Cook was in court. This judge, candidly and fully, disclosed his acquaintance with Mr. Jones and revealed the importance he attached to the testimony he was about to hear. The findings of fact and conclusions of law filed on September 30 merely formalized what the court stated from the bench. And certainly, on September 3, Ms. Bradford and her lawyer Mr. Cook knew or should have known every detail of the facts stated in the affidavits of Messrs. Dickerson, Kennon, Black, and in that of Ms. Rich because what these affiants recite were matters of common knowledge in the Negro community of Chicago, and many of these facts were reported in Chicago newspapers, and some can be found in public records. For these reasons, it is specious to argue, as Mr. Cook does on Ms. Bradford's behalf, that the significance of the facts attested to by the affiants were not known until "after the transcript of the relevant court proceedings became available after October 20, 1982." A lawyer does need the transcript of relevant court proceedings in order to know commonly known facts and what is revealed to him, in open court, by a presiding judge. But more importantly, this argument does not explain why Ms. Bradford waited until November 12, 1982, more than two months after the relevant facts were either known or knowable to her, before she filed her motions for disqualification of the court. The really honest explanation is that Ms. Bradford and her lawyer, all the facts being known or knowable to them on September 3, 1982, waited until this court denied plaintiffs' motion for a preliminary injunction on September 30, 1982, and then filed the motions to recuse.

A litigant should not be permitted to use disqualification motions as a means of "sampling the temper of the court before deciding whether or not to file an affidavit of prejudice. . . ." *Peckham* v. *Ronrico Corporation,* 288 F.2d 841, 843 (1st Cir. 1961). "One of the reasons for requiring promptness in filing the affidavit is that a party, knowing

of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives." *In re United Shoe Machinery Corporation*, 276 F.2d 77, 79 (1st Cir. 1960). *In City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368 (N.D. Ohio 1980), the court, citing from another case, told the movant before it that:

> The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming. 503 F.Supp. at 381.

Ms. Bradford must be told the same words. Her affidavits were not timely filed, and for this reason alone her motions to recuse should be denied. *United States* v. *International Business Machines Corp.*, 539 F.Supp. 473 (S.D. N.Y. 1982); see *Duplan Corporation* v. *Deering Milliken, Inc.*, 400 F.Supp. 497 (S. S.C. 1975); Annot. 24 A.L.R.Fed. 290. But there are additional reasons why her motions cannot be granted.

C

Section 144 of Title 28, United States Code, provides that:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, . . .

When faced with a motion under this statute, the court focuses on the movant's affidavit. *Chitimacha Tribe of*

*Louisiana* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982). It is well settled that the affidavit must be sworn to by a party to the action, *Giebe* v. *Pence*, 431 F.2d 942 (9th Cir. 1970), and not even one by counsel will meet this statutory requirement. *United States ex rel. Wilson* v. *Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); cf. *Paschall* v. *Mayone*, 454 F.Supp. 1289, 1300 (S.D. N.Y. 1978).

The affidavit must identify with particularity time, place, persons, and circumstances supporting the affiant's belief of personal bias against him or in favor of his opponent; and it must be of sufficient detail so "that the affiant would expose himself to a charge of perjury, if he were guilty of swearing to statements that he knew to be false." *Roussel* v. *Tidelands Capital Corp.*, 438 F.Supp. 684, 690 (N.D. Ala. 1977). This requirement, and that it be accompanied by counsel's affidavit of good faith, are designed to protect the integrity of the judicial system and prevent abuse of the recusal procedure. *Matter of Searches Conducted on March 5, 1980*, 494 F.Supp. 1283, 1288 (E.D. Wisc. 1980).

It has been said that for alleged bias or prejudice to be sufficient to require recusal, it "must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Wilks* v. *Israel*, 627 F.2d 32 (7th Cir. 1980). The alleged bias or prejudice must be personal and not judicial; it must bear directly on the current proceeding. *Matter of Searches Conducted on March 5, 1980*, 497 F.Supp. 1283, 1288 (E.D. Wisc. 1980). Moreover, the facts alleged in the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede partiality of judgment." *Berger* v. *United States*, 255 U.S. 22, 33 (1921). The standard under Section 144 is that of bias in fact. *Parish* v. *Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975); Note, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi.L.Rev. 236, 243 & n.37, 244 (1978).

It is obvious, from even a cursory examination of it, that the affidavit with which Ms. Bradford supports her Section 144 motion is legally insufficient. She does not describe any circumstance which would establish her claim of personal bias or prejudice by this court against her, or in favor of defendants. The affidavit consists of the bold assertion that "[t]he facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Lawrence Kennon, Faith Rich, and Timuel Black, which are attached hereto and made a part hereof."

It happens that none of these affiants is a party to this suit, nor is it claimed they belong to the certified class. And it has been held "that the doctrine of incorporation by reference has no place in a §144 affidavit." *Hall* v. *Burkett*, 391 F.Supp. 237, 242 (W.D. Okla. 1975). This holding is mandated by the requirement that it is "a party to any proceeding in a district court. . ." who must make and file a timely and sufficient affidavit before the statute will become operative. 28 U.S.C. §144. However, since they are being used to bring the impartiality of this court into question, it is important that these four affidavits be examined.

A substantial part of each one consists of autobiographical data which reveal the following concerning each affiant. Mr. Dickerson states that he is a Negro lawyer, a graduate of the University of Chicago Law School who, since 1920 and until January 1973, when he retired, was an insurance company executive. Throughout his professional life, he has been active in the civil rights movement. Ms. Rich is a retired Chicago Board of Education employee, holder of a doctorate from Bryn Mawr College. Since 1945, she too has been active and interested in the civil rights field, particularly with the Chicago Branch, NAACP. Mr. Kennon is a Chicago lawyer who since 1946 has been a member of the Chicago Branch, NAACP, and active with various civil rights organizations in Chicago and in other parts of the country. Mr. Black is a graduate of Roosevelt University and holds a

master's degree from the University of Chicago. He is a doctoral candidate for a degree in educational administration from the University of Chicago. He has held a number of academic positions in Chicago institutions of learning, and presently is full professor of social science at Loop College.

The gist of Mr. Dickerson's affidavit is the description of a conversation that took place between him and Mr. Theodore Jones in the fall of 1957 when he, Mr. Dickerson, asked Mr. Jones if he would be willing to serve as president of the Chicago Branch, NAACP. According to Mr. Dickerson, the occasion was the presence in his office of the national branch coordinator of the NAACP. Mr. Jones asked to be excused; and when he did not return, Mr. Dickerson went to Mr. Jones' office and found him engaged in a telephone conversation with Congressman William L. Dawson, then Democratic Committeeman of the Second Ward in Chicago. Mr. Jones told Mr. Dickerson that he had sought and obtained the approval and support of Mr. Dawson in his effort to become president of the Chicago Branch, NAACP. Subsequently, Mr. Dickerson said he attended the branch election; he saw present and voting a number of persons from Mr. Dawson's Second Ward organization who had not been known to be members of the NAACP. Mr. Dickerson concludes his rather short affidavit with the statement that "Mr. Jones was elected that evening as President of the Chicago Branch of the N.A.A.C.P."

In her affidavit, Ms. Rich describes her efforts, prior to 1957 working with the Chicago west and northside units of the NAACP, and with the Chicago Branch, particularly in matters relating to education. She states that prior to Mr. Jones' election as president of the Chicago Branch in late fall 1957, the northside unit produced a study of de facto segregation in Chicago public schools, and issued by the Chicago Branch. She says that negotiations by a committee of which she was a member with the Chicago Board of Education had proceeded to a point in December 1957 that representatives

of the City of Chicago and the board of education "were tentatively prepared to agree on alternative plans to those which the N.A.A.C.P. opposed." She said that after Mr. Jones was elected and took office, the Chicago Branch withdrew its support of the activity in the area in which she had worked. When the northside unit sought to continue these efforts, says Ms. Rich, Mr. Jones moved to abolish the unit. Several years after Mr. Jones' terms ended, the national office of the NAACP authorized establishment of three co-equal Chicago Branches, the south, the west, and the northside branches.

In his affidavit, Mr. Kennon refers to the years in which he had "represented individuals and organizations involved in the civil rights struggle, including the N.A.A.C.P. . . ." He also attended the Chicago Branch election meeting in the fall of 1957 when Mr. Jones was elected president. Mr. Kennon states that prior to this election, the Chicago Branch and its other units "were actively involved in pursuing civil rights matters in their respective spheres, of which several entailed challenges of various types to actions taken by the Democratic Party and/or the city of Chicago." He goes on to aver that prior to 1958 these units "were the action arms of the Chicago Branch of the N.A.A.C.P. . . ." and were for several years the source of data gathered by the Chicago Branch for actions in civil rights matters. Mr. Kennon states that "[t]he principal thrust of the Chicago Branch at that time, prior to 1957, was in the area of utilizing the units or their equivalents, on the one hand, for data gathering, issue identification, and direction action, utilizing the Branch and its Legal Redress Committee, on the other hand, for co-ordination and vindication of the rights of black people in the courts."

Mr. Kennon then continues his recital of the history of the NAACP Chicago Branch and his role as an adult adviser to the West Side Youth Council in 1957, 1958 and 1959. He refers to the Chicago Park District, one of the defendants in this case, and states that there were

demonstrations and protests in the summer of 1958 "against the District triggered by the beatings by whites of several blacks who had sought to use the facilities at Rainbow Beach, then a segregated beach located at the south of 75th Street." He states that "[w]e charged the Park District, among other things, with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities traditionally used by whites."

Then Mr. Kennon refers to Mr. Jones' administration as president of the Chicago Branch that began in late fall 1957. He asserts that the branch's support of the westside unit was withdrawn under Mr. Jones. He avers that:

> Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch N.A.A.C.P. were to be discontinued by Jones and his administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic Organization. Mr. Dawson was at that time Ward Committeeman of the Second Ward Regular Democratic Organization, and the publicly acknowledged leader of the third, fourth, and twentieth wards. Mr. Jones named as his administration's Chairman of the Legal Redress Committee of the Chicago Branch, and legal advisor to the president, George Leighton, who, on information and belief, was also connected to the Democratic Organization in that he had been president of the Third Ward Regular Democratic Organization, and continued to be active in the Chicago Democratic Organization.

Mr. Kennon continues with a recital of what happened within the NAACP in Chicago after Mr. Jones' election. He avers that "[t]he process of withdrawal of support by the Jones administration, which included George Leighton as legal counsel, resulted in a number of challenges being

made from time to time in N.A.A.C.P. meetings to the legality and propriety of actions taken by the Jones administration. These challenges were often referred to and decided in those meetings by George Leighton, whose opinions consistently favored whatever position had been taken by Mr. Jones." The affidavit continues to recite the disagreements, the philosophical differences that emerged in the administration of the Chicago Branch, NAACP during Mr. Jones' terms as president in 1957 and 1958. Mr. Kennon concludes his affidavit with the assertion that "I, and many others who were active in the Chicago Branch N.A.A.C.P. and its units during 1957-1959, seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people."

Mr. Timuel D. Black states in his affidavit that he had read all Mr. Kennon had said "and would testify to substantially the same effect if I were called as a witness in the case." He then asserts that he also attended the fall 1957 meeting of the Chicago Branch at which Mr. Jones was elected president. He says that precinct workers and captains of Mr. Dawson's political organization were present; these were people who "at that time publicly acknowledged to be under the leadership of William Dawson [sic]." Then he says that:

> I was one of several persons who sought, while Theodore Jones was president and George Leighton was Legal Redress Committee Chairman of the Chicago Branch N.A.A.C.P. to have the organization fulfill one of its traditional roles by moving legally against the city of Chicago and the Chicago Board of Education to remedy discrimination against blacks. In particular, in 1957 and 1958 we sought, in the wake of the decision of the United States Supreme Court in *Brown* v. *Board of Education*, to have the N.A.A.C.P. Legal Redress Committee seek the cessation of segregation in the Chicago public schools. We were rebuffed by Mr. Leighton and Mr. Jones. I and others

also sought in 1957 and 1958 to have the N.A.A.C.P and the Legal Redress Committee press the city of Chicago legally on the issue of housing segregation. Again, we were refused by Mr. Leighton and Mr. Jones.

The events surrounding the election of Mr. Jones in 1957 and, with respect to matters involving any challenge to city government and/or the Democratic Party, the subsequent inaction of the N.A.A.C.P. and its Legal Redress Committee, were the results of a deal whereby the Chicago Branch N.A.A.C.P. became a captive of the Democratic Party. The actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the Organization against its members, and were opposed to the interests of black people and the Organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the board of commissioners of the Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the N.A.A.C.P., where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party.

It is readily noticed that neither Ms. Renee Bradford nor anything this court has done or said about her is mentioned in any of these four affidavits. None of these affiants make any direct reference to this suit or its issues. None of these affidavits refer to, allege, describe, or aver any fact which shows that this court has a personal bias or prejudice against Ms. Bradford or in favor of the defendants, or any of them. Apparently, Ms. Bradford, or some lawyer on her behalf, believes that when this case is heard on the merits, the issues will be resolved, and the controversy decided, solely on Mr. Jones' testimony. This will not be so; and certainly, despite what this court has

said about Mr. Jones, no reasonable person will take those words to mean that he will be believed without regard to other evidence in the case.

One thing, however, is clear; none of these affiants hold Mr. Jones in high regard. And certainly, two of them, Messrs. Kennon and Black, do not think much of this judge's civil rights contributions to the Negroes of Chicago. But of what relevancy to the issues raised by Ms. Bradford's recusal motion is this review of Mr. Jones' Chicago Branch presidency, and of this judge's record as a civil rights lawyer?

An affidavit filed in support of a motion to recuse a judge under Section 144 is not a mechanism by which his civic accomplishments are appraised either for acclaim or condemnation. It is the means, provided by law, for a showing, with particularity, that the federal judge has a personal bias or prejudice either against the movant or in favor of any adverse party. See *United States* v. *Taylor,* 569 F.2d 448, 450 (7th Cir. 1978); cf. *International Business Machines Corp.,* 475 F.Supp. 1372, 1379-1381 (S.D. N.Y. 1979); Annot. 23 ALR Fed. 637. These four affidavits do not perform this important statutory function. *United States* v. *Ming,* 446 F.2d 1000, 1004 (7th Cir. 1972); *Peacock Records, Inc.* v. *Checker Records, Inc.,* 430 F.2d 85 (7th Cir. 1970). Consequently, even if Ms. Bradford could have incorporated them by reference into what she filed in support of the motion to recuse this court, her affidavit would not have qualified under Section 144, Title 28, United States Code. For these reasons, the court is compelled to conclude that the affidavits filed in support of the motion to disqualify pursuant to 28 U.S.C. §144 are not legally sufficient.

D

The affidavits with which Ms. Bradford supports her Section 455(a) motion are the same ones she filed in support of the motion under Section 144. Section 455(a) provides that "[a]ny justice, judge, or magistrate of the

United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This statute has been construed by many courts; and it has been the subject of comments by scholars. See, *e.q., Blizard* v. *Frechette,* 601 F.2d 1217 (1st Cir. 1979); *SCA Services, Inc.* v. *Morgan,* 557 F.2d 110 (7th Cir. 1977); *United States* v. *International Business Machines,* 475 F.Supp. 1372 (S.D. N.Y. 1979); Wright, Miller & Cooper, Federal Practice & Procedure, §3549; Comment, *The Elusive Appearance of Propriety: Judicial Disqualification under Section 455,* 25 DePaul L. Rev. 104 (1975); Comment, *Disqualification of Federal Judges for Bias Under 28 U.S.C. §144 and Revised §455,* 45 Fordham L. Rev. 139 (1976); note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. §455,* 178 U. of Ill. L. F. 863 (1978).

The concern under Section 455(a) is with the appearance of impartiality rather than the fact of bias or prejudice because, as one court has said, "[the] appearance of impartiality is virtually as important as the fact of impartiality." *Bell* v. *Chandler,* 569 F.2d 556, 560 (10th Cir. 1978). Accordingly, the test of recusal under this section is whether a reasonable person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Smith* v. *Pepsico, Inc.,* 434 F.Supp. 424, 425 (S.D. Fla. 1977); Annot. 40 A.L.R. Fed. 954, 959. This being so, a court considering the sufficiency of a recusal affidavit is not limited to the facts which it discloses; all evidence of the alleged bias or prejudice should be considered. *Matter of Searches Conducted on March 5, 1980,* 497 F.Supp. 1283, 1291 (E. D. Wisc. 1980). Both case law and legislative history of Section 455(a) establish that "[t]he basis for a disqualification for lack of impartiality must be reasonable. *S. J. Groves & Sons* v. *Intern. Bro. of Teamsters,* 581 F.2d 1241,, 1248 (7th Cir. 1978); H. Rep. No. 93-1453, 1974 U.S.Code Cong. & Admin. News, pp.6351, 6355. And, as in the case of a Section 144 motion, the determination should be made on the basis of conduct extra-

judicial in nature, as distinguished from conduct within a judicial context. *Davis* v. *Board of School Com'rs of Mobile County,* 517 F.2d 1044, 1052 (5th Cir. 1975).

Among the circumstances which are not disclosed in any of the affidavits is the fact that on more than one occasion, in open court, this judge made it clear to the parties that his only reason for wanting to hear from Mr. Theodore Jones was to learn what, as a park district commissioner, he knew of Chicago Park District policies with regard to the factor of race in the application of park resources. This judge emphasized his desire, and the need for evidentiary assistance in resolving the factual and legal issues presented by the motion for preliminary injunction. It is true, as shown by the Dickerson, Rich, Kennon and Black affidavits that this judge knew of, and participated in some of Mr. Jones' civic activities in the Chicago Branch, NAACP; but it was only in the course of these judicial proceedings that this judge had the opportunity to learn what Mr. Jones knew about the principal defendant in this case, the Chicago Park District. At no time did this judge, as did the district judge in *Roberts* v. *Bailar,* 625 F.2d 125, 127 (6th Cir. 1980), prejudge the testimony of Mr. Jones.

It is generally said that the bias or prejudice alleged in an affidavit to recuse must have its basis in something other than what the judge learned from his participation in the pending case; and merely showing that he has issued adverse rulings, taken adverse actions, or made unfavorable statements during the course of the litigation, is insufficient *Resident Advisory Board* v. *Rizzo,* 510 F.Supp. 793, 796 (E.D. Pa. 1981); 48 C.J.S. Judges 143. This being so, it is obvious that there is no appearance of partiality on the part of this judge from the fact, as stated by the four affiants, that more than two decades ago he worked with Mr. Jones in the civil rights activities of the Chicago Branch, NAACP; and that in these proceedings, this judge learned of, and commented upon,

Mr. Jones' activities between 1976 and 1979 as a Chicago Park District Commissioner. No reasonable person would think otherwise. Therefore, this court must conclude that these same affidavits are also legally insufficient to support Ms. Bradford's motion to recuse under 28 U.S.C. §455(a). Accordingly, an appropriate order will be entered denying the motion to transfer these disqualification motions to another judge of this court for hearing, and denying the motions to recuse under 28 U.S.C. §144 and 455(a).

So ordered,

/s/ George N. Leighton
George N. Leighton
United States District Judge

Dated: January 7, 1983